ESSAYS

UPON

I. The Law of Evidence.

II. New Trials.

III. Special Verdicts.

IV. Trials at Bar.

AND

V. Repleaders.

IN THREE VOLUMES.

By JOHN MORGAN,
OF THE INNER TEMPLE, BARRISTER AT LAW.

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Containing The IXth Division of Essay II.
with Essays III. IV. and V.

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ESSAY II.

Continued.

IX. Of other Matters respecting new Trials, &c.

(1.) Of Mis-trial.

ACTION of *debt*, brought upon the statute of *Ed.* VI. for *tithes*, and the plaintiff declared that one was seised of the rectory of *Elvely*, *alias Kirkley*, in *Kingston* upon *Hull*, in his demesne as of fee; and being so seised, on such a day, at *Elvely*, *alias Kirkley*, did demise to the plaintiff the said rectory, with the appurtenances, to have and to hold, *&c.* for years, and that by virtue thereof he had been and was thereof possessed, and that the defendant such a day, and before, and always afterwards, hitherto held and occupied thirty acres of land in *Swandland*, in *Kingston*, in a place called T. and that the tithes did belong to him. The defendant pleads, *Nil debet per patriam*; and after verdict it was alledged, in arrest of judgment, that the issue was mis-tried, because the *Venire facias* was of *Elvely alias Kirkley*, and it should have been of *Swandland*, where the tithes grew.

Cooper *v.* Bacon, 1 Brownl. 75. The Venire facias mis-awarded

I cannot

I cannot find this case in any other author: from the marginal note, I conceive the Court adjudged the *Venire facias* misawarded.

Smith and Hancock, and others, M. 24. Car. Banc. Reg. Stiles, 137.
For a new trial, because of a mis-trial, the cause being tried before persons interested.

Smith brought an action of trespass against *Hancock*, and others, for taking away divers parcels of ribbon from him. The defendants pleaded, by way of justification, the custom of *London* against hawkers; *videlicet*, to take away wares from any that sold them up and down the streets.

The plaintiff replied, that there was no such custom, and issue was taken upon it, and thereupon the custom was certified by the mouth of the Recorder, and a trial upon it in *London*, and a verdict for the defendants. The plaintiff moved in arrest of judgment, that it was a mis-trial, because it was before those who were interested in the cause, and therefore desired there might be another trial. *Roll* Justice said, it is against natural equity, for one to be judge in his own cause, although the other party admit it to be so, and therefore it is a mis-trial, though it were at the request of the plaintiff, because it is against natural reason. 8 *E. III. f.* 69. 5 *Ed. III.* 8. 9 *H. VII. f.* 21. *Hil.* 38 *Eliz.* in the Exchequer. The prayer of the plaintiff cannot help the trial, for the consent of both parties cannot change the law, much less the prayer of one of the parties. *Hales*, of counsel with the defendants, argued, that it was not a mis-trial, and said this concerns them in point of privilege of the city, and not merely in point of interest, before whom the judgment was given. 2dly. The consent of the party hath barred him of the advantage which otherwise he

he might have had. But *Roll* Justice answered, here is point of interest as well as point of privilege, for part of the goods taken come to the benefit of the city, and therefore they ought not to be their own judges, for this is against natural reason, and so it is a mis-trial. But it doth not appear here, whether the Mayor and Aldermen be another corporation or not, and distinct from the corporation alleged, which certified this custom by the mouth of the *Recorder*, and this is the sole doubt in the case. *The Court ordered that there should be a new trial, except cause shewn to the contrary. Q. Whether there shall be a repleader, or a new Venire?*

This was *replevin:* Lord *Mountague* was seised of the *Honour of Gloucester*, extending into *divers counties*, and consisting solely of services without demesnes; within which honour there is a custom that each tenant dying seised of an inheritance, shall pay for each messuage and cottage 5 s. and for each acre of pasture .... and for each acre of meadow .... *&c.* for which sums the bailiff of the lord or his deputies may distrain. *Sir Tho. Reed*, a tenant of the said honour, died seised of an estate in fee-simple or tail, after whose decease the bailiff distrained in an acre of which *Sir Tho.* died seised in *Denford*, in the county of *Northampton*, which acre is within the honour of *Gloucester* aforesaid; and note, that the custom aforesaid was for distraining any beasts upon the land within the honour. And upon *replevin* brought, issue was taken upon the custom, and *Venire facias* from *Denford.*

Hill v. Bunning, H. 12 Car. II. C. B. Entr. T. 1659. Ro. 402. 1 Sid. 17. Vid. Br. Avowry, 46. 14. H. IV. 2.

Replevin. Custom for having so much upon dying seised, &c. and for distraining all beasts.

Question from whence the Venire facias ought to have issued.

ford. And the custom being found, it was moved in arrest of judgment,

1. For the unreasonableness of the custom.

2. For the mis-trial.

With respect to the first point, a variety of arguments were used, *pro et con*; but as the Court did not give judgment upon that point, they are here omitted.

As to the second point, If this was a mis-trial? it was argued by *Maynard* and *Barnard* for the defendant, that this is not a mis-trial, but that the *Venire facias* from *Denford* is good enough, for it ought to be from the county of N. or from the county of *Gloucester*, or from the vill. of D. 1. It cannot be from the body of the county of N. inasmuch as it does not appear that the honour is in this county only; for it doth not appear that the honour is extended out of D. yet in truth the honour is extended into several counties. 2. It cannot be from the honour of *Gloucester*, for an honour is only an accumulation of services; and although an honour may consist of demesnes and services, yet this honour hath only services, and it cannot be shewn that a *Venire facias* was ever yet from an honour, because that *Littleton*'s argument may be used; *videlicet*, if such thing could have been done, it would have been seen before this time, therefore they concluded that the venue could not be from an honour, any more than from a forest, 1 Rep. 127. 3. Therefore if it cannot be from the two places before-mentioned, of necessity it ought to be from the vill. of *Denford*, where the capture is supposed. And to prove this, they relied upon a case between *Row et Litchford*, 16 *Jac.* in B. R. where upon

2 Leon. 36. Pl. 47.
Hob. 266.
2 Rob. Ab. 61; Pl. 2. Sid. 88. Pl. 4. Lat. 326. Pl. 5. 3 Cro. 200.

upon issue joined upon a custom of the *Stanaries*, a *Venire facias* was from the vill. where, &c. and not from the *Stanaries*, nor from the county. *Vide* 22 *H.* VI. 35. Where a *Venire facias* shall be from the vill. and not from the county. *Et vid. Cro.* 2. 8.

But, admitting that it was not a good trial by the common law, yet they said, that this being after verdict is aided by the stat. 21 *Jac.* cap. 13; for, by this statute, if a *Venire facias* be from one place, where it should be from two, if it be after verdict, it is aided, *Cro.* 1. 480. and *vide* a case upon this point T. 1649, in B. R. *Simpson* and *Golden*, *Entr.* 22. *Car.* I. *Ro.* 107. 1 Cro. 162, 170. 2 Ro. 617, 618.

But to this it was answered by the plaintiff's counsel, and so agreed *per Cur'*, that this is a mis-trial, and that not only by the common law, but also since the statute. For plaintiff Cur'.

1. By the common law: if land held of a manor be in another vill. the *venue* shall be from both; for if the issue is to be tried of a greater extent than the *venue*, as if the *venue* be of *King-Street*, where the issue is of *St. Margaret*, this is a mis-trial, for the *venue* ought to be as large as the thing to be tried. *Hob.* 76. And *Simonds et Burlowe*'s case, *Cro.* 2. *Arundell*'s case, *Co.* 6. And also on the other part it seems that the *venue* ought not to be larger than the issue, for if the *venue* be of a manor and vill, where it should be of the manor only, this is not good, as was held T. 12 *Jac.* in B. R. Ro. 1979. 2 Cro. 405.

And it is not necessary for us to enquire if the *venue* here ought to be of the body of the county, or of the honour; (but it seemed to the Chief Justice that it could not

be of the honour, and he used the argument of *Littleton si parentes conquerantur, &c.* be-
1 Inst. 81. b. Sid. 23. Dy. 376, 11, 23. fore, and of *Ld. Dyer,* 376. *Co. L.* 81. (*Sid.* 114.) that error does not lie upon a judgment in the *Cinque Ports,* because no such writ hath ever yet been brought) for it is sufficient to prove, that it ought not to be from *Denford,* and from D. it may not be; for how can the *visne* of D. try a custom of the honour of *Gloucester,* where it does not appear by all the pleadings that D. is within the said honour? therefore, for the same reason that it might be from D. it might be from any other vill, in the county of *Northampton.*

Vid. 16, 17. Car. II. cap. 8. 2. This is not aided by the statute, for the statute which aids this mis-trial, if any would, is the statute 21 *Jac.* c. 13. And this statute, as the Chief Justice said, only aids mis-trial in two cases.

1. This statute only aids where the *venue* ought to be from several places.

2. This statute only aids where one of the places is truly named; but in our case it is not so, for the statute does not extend to it.

Judgment. And so *per totam Cur',* after several arguments at the bar, the judgment was arrested, and a *Venire facias de novo* awarded, if the plaintiff chose to take it; but they agreed that he might be nonsuited if he would.

Hob. 16. Sid. 9, 13, 15. *Nota,* That the Court did not give their opinion as to the custom, nor as to the place from whence the *Venire facias* should issue.

The Chief Justice observed, that there was not any known place mentioned in the avowry as there ought to have been; but inasmuch

as

as it was after verdict, it was good enough, otherwise if there had been a demurrer before verdict, for the want of it upon such demurrer would have made the avowry bad, and so he said the books are reconciled. Sid. fo. 10.

By 4 *Ann*, *c.* 16. § 6. writs of *Venire* are to be *de corpore comitatus*.

Action of covenant was brought in *Hampshire*, and breach assigned for not repairing a house in *Berkshire*, and the issue joined was *non infregit conventionem*, and verdict in *Hampshire* for plaintiff.

Gilbert v. Martin, M. 15 Car. II. B. R. 1 Sid. 157.

Covenant in H. and breach assigned in another county, and trial in H. this is a mis-trial.

And it was moved, in arrest of judgment, that this was a mis-trial; and of this opinion was the Court upon consideration (except *Windham*) for they said, that this was a special issue, upon which nothing could be given in evidence but the not repairing of the house, which is in *Berkshire*; and although the privity remains, this action being proper, between those who are parties to the deed and not assignees, *&c.* yet not any election could be given to the plaintiff in this case, for which reason it seemed to them that it was a mis-trial.

1 Lev. 114. 7 Co. 2, 3. Ray. 85. 1 Keb. 575.

1 Cro. 101, 132, 142. 2 Cro. 446.

Action upon the case for an escape, upon *mesne* process, was brought in *Exeter* against the Sheriff of the county of *Devon*, and the declaration was of a taking at *Topsham*, which is in *Devonshire*, and that the defendant suffered him to escape at *Exeter*. And after verdict for the plaintiff it was moved, in arrest of judgment, because the plaintiff had declared against the Sheriff of *Devonshire* for an escape at *Exeter*, which is a city and county

Hopping v. Holmy, E. 20. Car. II. B. R. 1 Sid. 364.

Escape supposed in another county, yet good after verdict, and it shall be intended that he was there by Habeas Corpus, &c. 2 Keb. 350.

of itſelf, and not part of the county of *Devon*, and for this it was at firſt ſtayed.

7 Co. 2. a.

2 Browni. 165, 166. 2 And. 35. Pl. 22.

But, at another day, judgment was given for the plaintiff, by all but *Twiſden* Juſtice; for being after verdict, it ſhall be intended that the defendant had the cuſtody of his priſoner in *Exeter*, either upon *Habeas Corpus*, or upon freſh purſuit. But per *Twiſden* this is too foreign an intendment.

1 And. 291. 2 And. 35. The judge ſat in one county, and the jury were in another, upon the trial of this cauſe.

Nota, In this caſe it was ſaid, that in *Nottingham*, which is a city and county, the judge ſits in the city, and tries the cauſes of the county at large.

The jury were, and gave their verdict, in the county at large, but the clerk took and recorded their verdict in the city.

And judgment was given for the plaintiff, *Niſi*, &c.

Lander and Elliot. H. 3 & 4 Jac. II. in B. R. Comb. 75. Declaration in Middleſex, plea in Hertford.

Debt for rent brought in *Middleſex*. The defendant pleaded an entry before the rent became due, and that he was held out, &c. at ſuch a place in *Hertfordſhire*, where the land lay; and iſſue was taken thereon, and tried in Middleſex.

Mis-trial.

Pemberton moved, in arreſt of judgment, that this was a mis-trial.

Tremain contra. It is aided by the ſtatute of *Jeofailes*, *Croft*, and *Waters*'s caſe, in *Saunders*, adjudged (I believe he meant *Craft* and *Boit*. 1 *Saund.* 247) *Wiſe* and *Adderly*'s caſe in *C. B.* in *Saunders*.

Locality.

Pemberton. A local juſtification will alter the caſe, and the locality was neceſſary in our caſe; otherwiſe in the caſe in *Saunders*, (which was agreed by the Court) the later judgments are contrary to *Wiſe* and *Adderly*'s caſe; ſo *per Pollexfen* in *Jennings* and *Hankey*'s caſe.

Curia,

Curia. This is a mis-trial, and a *Venire facias de novo* was awarded.

The plaintiff declares, that he was the first inventor of the horizontal mill, for which he had letters patent for fourteen years, and that notwithstanding which, the defendant made another mill, like, &c. and damages, &c. Verdict *pro quer'.*

Edgborough v. Stephenson. P. 4 Jac. II. B. R. Comb. 34. Fact in Staffordshire, tried in Middlesex, no mis-trial.

Holt moved, in arrest of judgment, that it was a mis-trial in *Middlesex*, the mill being made in *Staffordshire*, where only the cause of action ariseth.

Obj. Bulwer's case. *Answ.* In that case there are two tortious acts there; *secus* in our case.

Here the letters patent are only an inducement to the action. 1 *Cro.* 143, 183.

He is the offender who useth the art, and not he that makes the mill, which the Court denied.

Pollexfen pro judicio.

The cause of action ariseth in both counties. *Vide* 7 *Co. Bulwer*'s case; but admitted, that before *Bulwer*'s case, the opinion was, that the action should be brought where the original fact was done.

Obj. That it is not averred, that no other used this art before the plaintiff, at the time of granting the patent.

Answ. It appears by the record *quod primus invenisset*, &c.

Obj. Notwithstanding that, it might be used beyond sea.

Answ. Admitting that, yet it shall be good, and within the statute, for that speaks only of new manufactures within this realm, which *Holloway* agreed.

The Court over-ruled the exceptions, and gave judgment *pro quer'.*

Del.

Smith v. Sepleton. In B. R. Comb. 115.

Bond at Chester tried here.

Debt on bond made at *Chester*, on *plene administravit* pleaded, it was tried here by *mittimus* to *Chester*, and a verdict for the plaintiff: it was now moved in arrest of judgment, that the bond being made at *Chester*, ought to be tried there; but it was adjudged, because it was not pleaded, that the party dwelt there, or had whereby to be attached there, that there would be a failure of justice, if it could not be tried here; and *Minshew* and *Ireton (per Dolben)* was adjudged accordingly.

Comb. 30, 48.

Judgment for the plaintiff. Vide *Fitz Jurisdiction*, 29, 57.; and *Jennings* and *Hankey*'s case. *Vide post*, *IX*. (2.)

Heath v. Walker, in Middlesex, T. 12 Geo. II. B. R. 2 Stra 1117.

If it appears no issue is joined, the jury must be dismissed.

Upon looking into the record there was no issue joined, for it was *et praed'* the defendant, instead of the plaintiff, *similiter:* it was therefore objected, that the Chief Justice had no commission to try any issue. And the doubt was, what to do, for the Jury had been sworn. And upon advising with the Bar, the Chief Justice dismissed the Jury, for he could not call the plaintiff, or suffer the defendant to take a verdict.

V. 1 Stra. 267.

IX.

IX. Of other Matters respecting new Trials, &c.

(2.) *Of Locality of Trial.*

Vide ante IX. (1.) *Lander v. Elliot.*

Lady Calverley v. Sir Richard Leving, P. 10. W. III. B. R. Comb. 472. Covenant, and several breaches assigned; one being local, tried out of the county, yet aided after verdict.

COVENANT laid at *Tarvin*, in the county of *Chester*, upon a demise of an house situate at *Chester:* and several breaches were assigned; *videlicet*, for non-payment of rent, and for not keeping the house in repair. The defendant pleaded *riens arrear*; and that he had kept the house in good repair, *&c.* whereupon several issues were joined, and the cause was tried by *mittimus* before the Chief Justice of *Chester* at the last Assizes, where the plaintiff obtained a verdict, and several damages upon the several issues: And now it was moved by Sir *Barth. Shower*, that this was a *mis-trial* as to the *repairs*, for it appears the house is situate in the city of *Chester*, which is a distinct county, and the issue being local, could not be tried by a jury *de vicineto de Tarvin in com. Cestr'*, and to that opinion the Chief Justice at first inclined; but afterwards, the whole Court held, that it was aided after verdict by the *stat.* 16 *and* 17 *Car. II.* being tried by a jury of the county where the action was laid.

Leeds v. Power. H. 7. Geo. B. R. 1 Stra. 41.

Error *tam in redditione judicii* in an ejectment in C. B. in *Ireland*, *quam in affirmatione ejusdem in B. R.* there.

How to compel an assignment of errors on writs from Ireland.

The beginning of the term I moved for the common rule, that the plaintiff should assign his errors, it not being usual to take out a *scire facias*, as we do on writs of error from *C. B.* When that rule was out, I moved again, upon an affidavit, that we could find nobody concerned for the plaintiff in error, and had fixed it up in the office; that therefore we might be at liberty to sign a *non pros*, else if we should be put to send the rule over to *Ireland* to be served, the delay would be as great as in the case of a *scire facias*, and it being a writ of the plaintiff's own suing out, he must be apprised when was the due time to come in and prosecute it. Whereupon the Court made a new rule, that unless errors were assigned within four days after fixing a new note up in the office, the defendant in error should be at liberty to sign a *non pros*.

Per Strange: Hill. 8 Geo. Huxley v. Burton. In an Irish writ of error I had the same rule.

Hill. 11 Geo. Waters v. Ballantine, I had the same rule on my motion.

Within the time errors were assigned; and on the arguing, *Reeve* objected, that it is an ejectment for lands in the county of *Dublin*, and yet the trial is at the King's court in the county of the city of *Dublin*.

Strange contra. This Court will not take notice that they are distinct counties, but rather intend the city to be part of the county, that the county of the city of *Dublin* is the county in which the city of *Dublin* lies. Or if they should, yet the trial may be right, for it runs *postea die et loco infra content'*, which *locus infra contentus* may be as well the place within the county of *Dublin* where the demise is laid to be made, as any other.

Or

Or admitting it a trial out of the proper county, yet it is helped by the 16 *and* 17 *Car. II. c.* 8. which is enacted in *Ireland* by 17 *and* 18 *Car. II. c.* 12. being a trial by a jury of the proper county, for the award of the *venire* is previous to any mention of the county of the city, and commands the sheriff of the county to summon twelve men of his county, and then the trial is had by the *juratores unde infra sit mentio.*

If this be not right, there never was a proper trial of any cause arising in the county of *Dublin*; for the King's courts sitting in the city of *Dublin*, it is there all the trials of those causes are had: just as here, where causes of *Middlesex* are tried in the same place where the King's Bench sits. We have instances in *England* of county causes being tried in cities which are counties also, as at *Worcester*, where both are tried in the same place.

The Court said, they must intend them distinct counties; but as to the other points, they went over to be inquired into. And afterwards,

In answer to the objection made the last term, that the lands lay in the county of *Dublin*, and the trial was in the county of the city of Dublin, *Strange* now cited an act of parliament made in *Ireland* 17 *and* 18 *Car. II. c.* 20, which appoints the trial of causes arising in the county of *Dublin* to be at *Nisi prius* in the same place where the King's courts sit, in the county of the city of *Dublin*. So the judgment was affirmed.

N. B. There being such an express act of parliament, I thought it not necessary to put it on the former foot of being a trial by a

jury

Vide ante.

Carth. 448.

jury of the proper county, which would have been a sufficient answer: for *Pasch.* 10 *W. III. B. R. Lady Calverley v. Sir Richard Leving*, in covenant, the case was sent into the county palatine of *Chester*, on a local plea of a matter arising in the county of the city of *Chester*: the *mittimus* to the *C. J.* was to award a *venire* to the sheriff of the county of *Chester*, which was done accordingly; and after verdict *pro quer'*, moved by Sir *Barth. Shower*, in arrest of judgment, that this is a mis-trial, not aided by the statute of *Jeofails*; being a trial in a wrong county: but the Court held it was aided: and that is a stronger case than this, where it appears the trial was by a jury of the proper county, as it was not in that case; and in delivering the resolution of the Court, *Holt C. J.* cited *Chew. v. Brigs* in *B. R.* where he said it had been so held likewise, and so is 1 *Saund.* 246. *Craft v. Boite.*

At Guildhall *coram Eyre, C. J. de C. B.*

Shelling v. Farmer. M. 12 Geo. C. B.
1 Stra. 646.
Seising an house in the East Indies is not triable here.

In an action of trespass and imprisonment for facts done in the *East Indies*, the plaintiff laid them all (being transitory) in *London*, and *inter alia* declared for seising the plaintiff's house, situate *apud London praed' in parochia et warda praed'*. It was objected *pro def'* that the trespass as to the house was local, and they could not give evidence of seising a house in the *East Indies*. And *Eyre, C. J.* refused to let the plaintiff give evidence as to the house, comparing it to the case of rent for a house at *Barbadoes*, where it has been held you may bring covenant for the rent in *England*, but an action of debt, which is local, cannot be brought here.

Vide Post. Mostyn and Fabrigas.

On

On the 8th of June, in last term, *Mr. Justice Gould* came personally into Court, to acknowledge his seal affixed to a bill of exceptions in this case; and errors having been assigned thereupon, they were now argued.

Moſtyn v. Fabrigas. M. 15 Geo. III. B.R. Cowp. 161. 1774, Tueſ. Nov. 14. Treſpaſs and falſe impriſonment lies in England by a native Minorquin againſt a governor of Minorca, for ſuch injury committed by him in Minorca.

This was an action of treſpaſs, brought in the court of Common Pleas, by *Anthony Fabrigas* againſt *John Moſtyn*, for an aſſault and falſe impriſonment; in which the plaintiff declared, that the defendant on the 1ſt of *September*, in the year 1771, with force and arms, *&c.* made an aſſault on the ſaid *Anthony*, at *Minorca*, (to wit) at *London* aforeſaid, in the pariſh of *St. Mary-le-Bow*, in the ward of *Cheap*, and beat, wounded, and ill-treated him, and then and there impriſoned him, and kept and detained him in priſon there for a long time, (to wit, for the ſpace of ten months) without any reaſonable or probable cauſe, contrary to the laws and cuſtoms of this realm, and againſt the will of the ſaid *Anthony*, and compelled him to depart from *Minorca* aforeſaid, where he was then dwelling and reſident, and carried, and cauſed to be carried, the ſaid *Anthony* from *Minorca* aforeſaid to *Carthagena*, in the dominions of the King of *Spain*, *&c.* to the plaintiff's damage of £.10,000.

The defendant pleaded, 1ſt, Not Guilty; upon which iſſue was joined. 2dly, A ſpecial juſtification, that the defendant at the time when, *&c.* and long before, was governor of the ſame iſland of *Minorca*, and during all that time was inveſted with, and did exerciſe, all the powers, privileges, and authorities, civil and military, belonging to the government of the ſaid iſland of *Minorca*, in parts beyond the ſeas; and the ſaid *Anthony*, before the

ſaid

ſaid time when, &c. (to wit) on the ſaid 1ſt of *September*, in the year aforeſaid, at the iſland of *Minorca* aforeſaid, was guilty of a riot, and was endeavouring to raiſe a mutiny among the inhabitants of the ſaid iſland, in breach of the peace: whereupon the ſaid *John*, ſo being governor of the ſaid iſland of *Minorca* as aforeſaid, at the ſaid time, when, *&c.* in order to preſerve the peace and government of the ſaid iſland, was obliged to, and did then and there order the ſaid *Anthony* to be baniſhed from the ſaid iſland of *Minorca*; and in order to baniſh the ſaid *Anthony*, did then and there gently lay hands upon the ſaid *Anthony*, and did then and there ſeiſe and arreſt him, and did keep and detain the ſaid *Anthony*, before he could be baniſhed from the ſaid iſland, for a ſhort ſpace of time, (to wit) for the ſpace of ſix days then next following; and afterwards (to wit) on the 7th of September, in the year aforeſaid, at *Minorca* aforeſaid, did carry, and cauſe to be carried, the ſaid *Anthony*, on board a certain veſſel, from the iſland of *Minorca* aforeſaid to *Carthagena* aforeſaid, as it was lawful for him to do, for the cauſe aforeſaid; which are the ſame making the ſaid aſſault upon the ſaid *Anthony*, in the firſt count of the ſaid declaration mentioned, and beating and ill-treating him, and impriſoning him, and keeping and detaining him in priſon for the ſaid ſpace of time, in the ſaid firſt count of the ſaid declaration mentioned, and compelling the ſaid *Anthony* to depart from *Minorca* aforeſaid, and carrying, and cauſing to be carried, the ſaid *Anthony* from *Minorca* to *Carthagena*, in the dominions of the King of *Spain*, whereof the ſaid *Anthony* has above complained

againſt

againſt him, and this he is ready to verify; wherefore he prays judgment, *&c.* without this, that the ſaid *John* was guilty of the ſaid treſpaſs, aſſault, and impriſonment, at the pariſh of *St. Mary le Bow,* in the ward of *Cheap,* or elſewhere, out of the ſaid iſland of *Minorca* aforeſaid. Replication *de injuria ſuâ propriâ abſq. tali cauſâ.* At the trial the jury gave a verdict for the plaintiff, upon both iſſues, with £. 3000 damages, and £. 90 coſts.

The ſubſtance of the evidence, as ſtated by the bill of exceptions, was as follows:—On behalf of the plaintiff, that the defendant, at the iſland of *Minorca,* on the 17th of *September* 1771, ſeiſed the plaintiff, and, without any trial, impriſoned him for the ſpace of ſix days againſt his will, and baniſhed him for the ſpace of twelve months from the ſaid iſland of *Minorca* to *Carthagena* in *Spain.* On behalf of the defendant; that the plaintiff was a native of *Minorca,* and at the time of ſeiſing, impriſoning, and baniſhing him as aforeſaid, was an inhabitant of and reſiding in the *Arraval* of *St. Phillip*'s, in the ſaid iſland; that *Minorca* was ceded to the crown of *Great Britain,* by the treaty of *Utrecht,* in the year 1713. That the *Minorquins* are in general governed by the *Spaniſh* laws, but when it ſerves their purpoſe plead the *Engliſh* laws; that there are certain magiſtrates, called the chief juſtice criminal, and the chief juſtice civil, in the ſaid iſland; that the ſaid iſland is divided into four diſtricts, excluſive of the *Arraval of St. Phillip*'s; which the witneſs always underſtood to be ſeparate and diſtinct from the others, and under the immediate order of the governor; ſo that no magiſtrate of *Mahon* could go there

 to

to exercise any function, without leave first had from the governor: that the *Arraval* of *St. Phillip*'s is surrounded by a line wall on one side, and on the other by the sea, and is called the Royalty, where the governor has greater power than any where else in the island; and where the judges cannot interfere but by the governor's consent; that nothing can be executed in the *Arraval* but by the governor's leave, and the judges have applied to him, the witness, for the governor's leave to execute process there. That for the trial of murder and other great offences committed within the said *Arraval*, upon application to the governor, he generally appoints the *assesseur* criminal of *Mahon*, and for lesser offences, the *Mustastaph*; and that the said *John Mostyn*, at the time of the seising, imprisoning, and banishing the said *Anthony*, was the governor of the said island of *Minorca*, by virtue of certain letters patent of his present Majesty. Being so governor of the said island, he caused the said *Anthony* to be seised, imprisoned, and banished as aforesaid, without any reasonable or probable cause, or any other matter alledged in his plea, or any act tending thereto.

This case was argued this term, by Mr. *Buller*, for the plaintiff in error, and Mr. *Peckham*, for the defendant. Afterwards, in Hilary term 1775, by Mr. Serjeant *Walker*, for the plaintiff, and Mr. Serjeant *Glynn*, for the defendant.

For the plaintiff in error. There are two questions, 1st. Whether in any case an action can be maintained in this country for an imprisonment at *Minorca*, upon a native of that place?

2dly. Suppoſing an action will lie againſt any other perſon, whether it can be maintained againſt the Governor, acting as ſuch in the peculiar diſtrict of the *Arraval* of *St. Phillip's*?

In the diſcuſſion of both theſe queſtions, the conſtitution of the iſland of *Minorca*, and of the *Arraval* of *St. Phillip's*, are material. Upon the record it appears, that by the treaty of *Utrecht*, the inhabitants had their own property and laws preſerved to them. The record further ſtates, that the *Arraval* of *St. Phillip's*, where the preſent cauſe of action aroſe, is *ſubject* to the immediate *controul* and order of the *governor only*, and that no judge of the iſland can execute any function there, without the particular leave of the governor for that purpoſe. 1ſt. If that be ſo, and the *lex loci* differs from the law of this country; the *lex loci* muſt decide, and not the law of this country. The caſe of *Robinſon verſus Bland*, 2 *Bur*. 1078, does not interfere with this poſition; for the doctrine laid down in that caſe is, that where a tranſaction is entered into between *Britiſh* ſubjects with a view to the *law of England*, the law of the *place* can never be the rule which is to govern. But where an act is done, as in this caſe, which by the law of *England* would be a crime, but in the country where it is committed is no crime at all; the *lex loci* cannot be the rule. It was ſo held by Lord *C. J. Pratt*, in the caſe of *Pons verſus Johnſon*, ſittings after Trinity term 1765.

2d. In criminal caſes, an offence committed in foreign parts, cannot, except by particular ſtatutes, be tried in this country. 1*ſt Vezey*, 246. The *Eaſt India Company verſus Campbell*. If crimes committed abroad cannot be tried here, much leſs ought civil injuries, be-

caufe the latter depend upon the police and conftitution of the country where they occur, and the fame conduct may be actionable in one country which is juftifiable in another. But in crimes, as murder, perjury, and many other offences, the laws of moft countries take for their bafis, the law of God and the law of nature; and therefore, though the trial be in a different country from that in which the offence was committed, there is a greater probability of diftributing equal juftice in fuch cafes than in civil actions. In *Keilway* 202. it was held that the court of *Chancery* cannot entertain a fuit for dower, in the *Ifle of Man*, though it is part of the territorial dominions of the crown of *England*.

3d. The cafes where the courts of *Weftminfter* have taken cognizance of tranfactions arifing abroad, feem to be wholly on contracts, where the laws of the foreign country have agreed with the laws of *England*, and between *Englifh* fubjects; and even there it is done by a legal fiction; namely, by fuppofing under a *videlicet*, that the caufe of action did arife within this country, and that the place abroad lay either in *London* or *Iflington*. But where it appears upon the face of the record, that the caufe of action did arife in foreign parts, there it has been held that the Court has no jurifdiction, 2 *Lutw*. 946. Affault and falfe imprifonment of the plaintiff, at *Fort St. George*, in the *Eaft Indies*, in parts beyond the feas; *videlicet*, at *London*, in the parifh of *St. Mary le Bow*, in the ward of *Cheap*—It was refolved, by the whole Court, that the declaration was ill, becaufe the trefpafs is fuppofed to be committed at *Fort St. George*, in parts beyond the feas, *videlicet*, in *London*; which

is

is repugnant and abſurd: and it was ſaid, by the Chief Juſtice, that if a bond *bore date* at *Paris*, in the kingdom of *France*; it is not triable here. In the preſent caſe, it does appear upon the record, that the offence complained of was committed in parts beyond the ſeas, and the defendant has concluded his plea with a traverſe, that he was not guilty in *London*, in the *pariſh of St. Mary le Bow*, or elſewhere, *out* of the iſland of *Minorca*. Beſides, it ſtands admitted by the plaintiff; becauſe if he had thought fit to have denied it, he ſhould have made a new aſſignment, or have taken iſſue on the place. Therefore, as Juſtice *Dodderidge* ſays, in *Latch*. 4. the Court muſt take notice, that the cauſe of action aroſe out of their juriſdiction.

Before the ſtatute of *Jeofails*, even in caſes the moſt tranſitory, if the cauſe of action was laid in *London*, and there was a local juſtification, as at *Oxford*, the cauſe muſt have been tried at *Oxford*, and not in *London*. But the ſtatute of *Jeofails* does not extend to *Minorca*: therefore this caſe ſtands entirely upon the common law; by which the trial is bad, and the verdict void.

The inconveniences of entertaining ſuch an action in this country are many, but none can attend the rejecting it. For it muſt be determined by the law of this country, or by the law of the place where the act was done. If by our law, it would be the higheſt injuſtice, by making a man who has regulated his conduct by one law, amenable to another totally oppoſite. If by the law of *Minorca*, how is it to be proved? There is no legal mode of certifying it, no proceſs to compel the attendance of witneſſes, nor means to make them anſwer.

The consequence would be, to encourage every disaffected or mutinous soldier to bring actions against his officer, and to put him upon his defence, without the power of proving either the law or the facts of his case.

II. Point. If an action would lie against any other person, yet it cannot be maintained against the Governor of *Minorca*, acting as such, within the *Arraval of St. Phillip*'s.

The governor of *Minorca*, at least within the district of *St. Phillip*'s, is absolute: both the civil and criminal jurisdiction vest in him as the *supreme power*, and as such he is accountable to none but God. But supposing he were not absolute, in this case, the act complained of was done by him in a judicial capacity as criminal judge; for which no man is answerable. 1 *Salk*. 396. *Groenvelt versus Burwell*. 2 *Mod*. 218. *Show*. *Parl*. cases 24. *Dutton versus Howell*, are in point to this position; but more particularly the last case; where in trespass, assault, and false imprisonment, the defendant justified as governor of *Barbadoes*, under an order of the council of state in *Barbadoes*, made by himself and the council, against the plaintiff (who was the deputy governor) for mal-administration in his office; and the House of Lords determined, that the action would not lie here. All the grounds and reasons urged in that case, and all the inconveniences pointed out against that action hold strongly in the present. This is an action brought against the defendant for what he did as Judge; all the records and evidence which relate to the transaction are in *Minorca*, and cannot be brought here; the laws there are different from what they are in this country; and as it is said in the conclusion of that argument,

ment, government muſt be very weak indeed, and the perſons entruſted with it very uneaſy, if they are ſubject to be charged with actions here, for what they do in that character in thoſe countries. Therefore, unleſs that caſe can be materially diſtinguiſhed from the preſent, it will be an authority, and the higheſt authority that can be adduced, to ſhew that this action cannot be maintained; and that the plaintiff in error is entitled to the judgment of the Court.

Mr. *Peckham*, for the defendant in error.

Firſt. The objection to the juriſdiction is now too late; for wherever a party has once ſubmitted to the juriſdiction of the Court, he is for ever after precluded from making any objection to it. *Year Book* 22. *H. VI. fol.* 7. *Co. Litt.* 127. *b. T. Raym.* 34. 1 *Mod.* 81. 2 *Mod.* 273. 2 Lord *Raym.* 884. 2 *Vern.* 483.

Secondly, An action of treſpaſs can be brought in *England* for an injury done abroad. It is a tranſitory action, and may be brought any where. *Co. Litt.* 282. 12 *Co.* 114. *Co. Litt.* 261. *b.* where Lord *Coke* ſays, that an obligation made beyond ſeas, at *Bourdeaux* in *France*, may be ſued here in *England*, in what place the plaintiff will. Captain *Parker* brought an action of treſpaſs and falſe impriſonment againſt Lord *Clive* for injuries received in *India*, and it was never doubted but that the action did lie. And at this time there is an action depending between *Gregory Cojimaul*, an *Armenian* merchant, and Governor *Verelſt*, in which the cauſe of action aroſe in *Bengal*. A bill was filed by the Governor in the *Exchequer* for an injunction, which was granted; but on appeal to the Houſe of Lords, the injunction was diſſolved; therefore the ſupreme court of

judicature, by diſſolving the injunction, acknowledged that an action of treſpaſs could be maintained in *England*, though the cauſe of action aroſe in *India*.

Thirdly, There is no diſability in the plaintiff which incapacitates him from bringing this action. Every perſon born within the ligeance of the king, though without the realm, is a natural born ſubject; and as ſuch, is entitled to ſue in the king's courts. *Co. Litt.* 129. The plaintiff, though born in a conquered country, is a ſubject, and within the ligeance of the king. 2 *Burr.* 858.

In 1 *Salk.* 404. Upon a bill to foreclose a mortgage in the iſland of *Sarke*, the defendants pleaded to the juriſdiction, *viz.* that the iſland was governed by the laws of *Normandy*, and that the party ought to ſue in the courts of the iſland, and appeal. But Lord Keeper *Wright* over-ruled the plea; "otherwiſe there might be a failure of juſtice if the Chancery could not hold plea in ſuch caſe, the party being here." In this caſe both the parties are upon the ſpot. In the caſe of *Ramkiſſenſeat verſus Barker*, upon a bill filed againſt the repreſentatives of the governor of *Patna*, for money due to him as his *Banyan*; the defendant pleaded, that the plaintiff was an alien born, and an alien infidel, and therefore could have no ſuit here. But Lord *Hardwicke* ſaid, "as the plaintiff's was a mere perſonal demand, it was extremely clear that he might bring a bill in this Court;" and he over-ruled the defendant's plea without hearing one counſel of the other ſide.

The caſe of the Counteſs of *Derby*, *Keilway* 202. does not affect the preſent queſtion; for that was a claim of dower; which is a *local* action, and cannot, as a tranſitory action, be

tried

tried any where. The other cases from *Latch* and *Lutwyche*, were either local actions, or questions upon demurrer; therefore not applicable to the case before the Court; for a party may avail himself of many things upon a demurrer, which he cannot by a writ of error. The true *distinction* between *transitory* and *local* actions is, the former may be tried any where; the latter cannot, and this is a transitory action. But there is one case which more particularly points out the distinction, which is the case of Mr. *Skinner*, referred to the twelve Judges from the Council-board. In the year 1657, when trade was open to the *East Indies*, he possessed himself of a house and warehouse, which he filled with goods at *Jamby*; and he purchased of the king at *Great Jamby* the islands of *Baretha*. The agents of the *East India Company assaulted his person*, seised his warehouse, carried away his *goods*, and took and *possessed* themselves of the *islands of Baretha*. Upon this case it was propounded to the Judges, by an order from the King in council, dated the 12th *April*, 1665, "Whether Mr. *Skinner* could have a full relief in any ordinary court of law?" Their opinion was, "That his Majesty's ordinary courts of justice at *Westminster* can give relief for taking away and spoiling his ship, goods and papers, and assaulting and wounding his person, notwithstanding the same was done beyond the seas. But that as to the detaining and *possessing* the *house* and *islands* in the case mentioned, he is not relievable in any ordinary court of justice." It is manifest from this case, that the twelve Judges held, that an action might be maintained here for spoiling his goods, and seising his person, because an action of trespass is a

transitory

transitory action; but an action could not be maintained for possessing the house and land, because it is a *local* action.

Fourth Point. It is contended that General *Mostyn* governs as all absolute sovereigns do, and that *stet pro ratione voluntas* is the only rule of his conduct. From whom does the governor derive this despotism? Not from the king, for the king has no such power, and therefore cannot delegate it to another. Many cases have been cited, and much argument has been adduced to prove that a man is not responsible in an action for what he has done as a Judge; and the case of *Dutton versus Howell* has been much dwelt upon; but that case has not the least resemblance to the present. The ground of that decision was, that Sir *John Dutton* was acting with his council in a judicial capacity, in a matter of public accusation, and agreeable to the laws of *Barbadoes*, and only let the law take its course against a criminal. But Governor *Mostyn* neither sat as a military or as a civil judge; he heard no accusation, he entered into no proof; he did not even see the prisoner; but in direct opposition to all laws, and in violation of the first principles of justice, followed no rule but his own arbitrary will, and went out of his way to persecute the innocent. If that be so, he is responsible for the injury he has done: and so was the opinion of the court of *C. B.* as delivered by Lord Chief Justice *De Grey* on the motion for a new trial. If the governor had secured him, said his Lordship, nay, if he had barely committed him, that he might have been amenable to justice; and if he had immediately ordered a prosecution upon any part of his conduct, it would have been another question; but the governor knew he could no more imprison him for a twelve-

twelvemonth (and the banishment for a year is a continuation of the original imprisonment) than that he could inflict the torture. Lord *Bellamont*'s case, 2 *Salk.* 625. *Pas.* 12. *W.* 3. is a case in point to shew that a governor abroad is responsible here: and the stat. 12 *W.* 3. passed the same year, for making governors abroad amenable here in *criminal* cases, affords a strong inference that they were already answerable for *civil* injuries, or the legislature would at the same time have provided against that mischief. But there is a late decision not distinguishable from the case in question, *Comyn versus Sabine*, governor of *Gibraltar*, *Mich.* 11. *Geo.* 2. The declaration stated, that the plaintiff was a master carpenter of the office of ordnance at *Gibraltar*; that Governor *Sabine* tried him by a court-martial to which he was not subject, that he underwent a sentence of 500 lashes; and that he was compelled to depart from *Gibraltar*, which he laid to his damage of £. 10,000. The defendant pleaded not guilty, and justified under the sentence of the court-martial. There was a verdict for the plaintiff, with £. 700. damages. A writ of error was brought, but the judgment affirmed.

Vide Post XI.

With respect to the *Arraval of St. Phillip*'s being a peculiar district under the immediate authority of the governor alone, the opinion of Lord Chief Justice *De Grey* upon the motion for a new trial, is a complete answer: "One of "the witnesses in the cause (said his Lordship) "represented to the jury, that in some particu- "lar cases, especially in criminal matters, "the governor resident upon the island, does "exercise a legislative power. It was gross "ignorance in that person to imagine such a

"thing;

" thing; I may ſay it was impoſſible, that a
" man who lived upon the iſland in the ſtation
" he had done, ſhould not know better, than
" to think that the governor had a civil and
" criminal power in him. The governor is
" the king's ſervant; his commiſſion is from
him, and he is to execute the power he is
" inveſted with under that commiſſion; which
" is, to execute the laws of *Minorca*, under
" ſuch regulations as the king ſhall make in
" council. It was a vain imagination in the
" witneſſes to ſay, that there were five *terminos*
" in the iſland of *Minorca*; I have, at various
times, ſeen a multitude of authentic docu-
" ments and papers relative to that iſland, and
" I do not believe that in any one of them,
" the idea of the *Arraval of St. Phillip*'s being
" a diſtinct juriſdiction, was ever ſtarted.
" *Mahon* is one of the four *terminos*, and *St.*
" *Phillip*'s, and all the diſtrict about it, is
" comprehended within that *termino*; but to
" ſuppoſe that there is a diſtinct juriſdiction,
" ſeparate from the government of the iſland,
" is ridiculous and abſurd." Therefore as the defendant, by pleading in chief, and ſubmitting his cauſe to the deciſion of an *Engliſh* jury, is too late in his objection to the juriſdiction of the Court; as no diſability incapacitates the plaintiff from ſeeking redreſs here; and as the action which is a tranſitory one is clearly maintainable in this country, though the cauſe of action aroſe abroad, the judgment ought to be affirmed. Should it be reverſed, I fear the public, with too much truth, will apply the lines of the Roman ſatiriſt on the drunken *Marius* to the preſent occaſion; and they will ſay of Governor *Moſtyn*, as was formerly ſaid of him,

Hic

Hic est damnatus inani judicio;

and to the *Minorquins*, if Mr. *Fabrigas* ſhould be deprived of that ſatisfaction in damages which the jury gave him,

At tu victrix provincia ploras.

Lord MANSFIELD. Let it ſtand for another argument. It has been extremely well argued on both ſides.

On *Friday* 27th *January*, 1755, it was very ably argued by Mr. Serjeant *Glynn*, for the plaintiff, and by Mr. Serjeant *Walker* for the defendant.

Lord MANSFIELD. This is an action brought by the plaintiff againſt the defendant, for an aſſault and falſe impriſonment; and part of the complaint made, being for baniſhing him from the iſland of *Minorca* to *Carthagena* in *Spain*, it was neceſſary for the plaintiff, in his declaration, to take notice of the real place where the cauſe of action aroſe; therefore he has ſtated it to be in *Minorca*; with *a videlicet*, at *London*, in the pariſh of *St. Mary le Bow*, in the ward of *Cheap*. Had it not been for that particular requiſite, he might have ſtated it to have been in the county of *Middleſex*. To this declaration the defendant put in two pleas. *Firſt*, "not guilty;" ſecondly, that he was Governor of *Minorca* by letters patent from the Crown; that the plaintiff was raiſing a ſedition and mutiny; and that in conſequence of ſuch ſedition and mutiny, he did impriſon him, and ſend him out of the iſland; which as Governor, being inveſted with all the privileges, rights, &c. of governor, he alledges he had a right to do. To this plea the plaintiff does not demur, nor does he deny that it

would be a juſtification in caſe it were true: but he denies the truth of the *fact*; and puts in iſſue whether the *fact* of the plea is true. The plea avers that the aſſault for which the action was brought aroſe in the iſland of *Minorca*, *out* of the realm of *England*, and no where elſe. To this the plaintiff has made no new aſſignment, and therefore by his replication he *admits* the *locality* of the cauſe of action.

Thus it ſtood on the pleadings. At the trial the plaintiff went into the evidence of his caſe, and the defendant into evidence of his; but on behalf of the defendant, evidence different from the facts alledged in his plea of juſtification was given, to ſhew that the *Arraval* of *St. Phillip's*, where the injury complained of was done, was not within either of the four precincts, but is a diſtrict of itſelf, more immediately under the power of the governor; and that no judge of the iſland can exerciſe juriſdiction there, without a ſpecial appointment from him. Upon the facts of the caſe the judge left it to the jury, who found a verdict for the plaintiff, with £.3000 damages. The defendant has tendered a bill of exceptions, upon which bill of exceptions the cauſe comes before us; and the great difficulty I have had upon both the arguments, has been to be able clearly to comprehend what the queſtion is, which is meant ſeriouſly to be brought before the Court.

If I underſtand the counſel for Governor *Moſtyn* right, what they ſay is this: the plea of not guilty is totally immaterial; and ſo is the plea of juſtification, becauſe upon the plaintiff's own ſhewing it appears, 1ſt, that the cauſe of action aroſe in *Minorca*, out of the

realm; 2dly, that the defendant was governor of *Minorca*, and by virtue of ſuch his authority impriſoned the plaintiff. From thence it is argued, that the Judge who tried the cauſe ought to have refuſed any evidence whatſoever, and have directed the Jury to find for the defendant: and three reaſons have been aſſigned. One, inſiſted upon in the former argument, was, that the plaintiff, being a *Minorquin*, is incapacitated from bringing an action in the king's courts in *England*. To diſpoſe of that objection at once, I ſhall only ſay, it is wiſely abandoned to-day; for it is impoſſible there ever could exiſt a doubt, but that a ſubject born in *Minorca*, has as good a right to appeal to the king's courts of juſtice, as one who is born within the ſound of *Bow* bell: and the objection made in this caſe, of its not being ſtated on the record that the plaintiff was born ſince the treaty of *Utrecht*, makes no difference. The two other grounds are, 1ſt, that the defendant being *governor* of *Minorca*, is anſwerable for no injury whatſoever done by him in that capacity: 2dly, that the injury being done at *Minorca*, *out* of the realm, is not cognizable by the king's courts in *England*. —As to the firſt, nothing is ſo clear as that to an action of this kind the defendant, if he has any juſtification, muſt plead it; and there is nothing more clear, than that if the Court has not a *general juriſdiction* of the ſubject-matter, he muſt *plead* to the *juriſdiction*, and cannot take advantage of it upon the *general iſſue*. Therefore by the law of *England*, if an action be brought againſt a judge of record for an act done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a complete juſtification. So in this

caſe,

cafe, if the injury complained of had been done by the defendant as a Judge, though it arofe in a foreign country where the technical diftinction of a Court of Record does not exift, yet fitting as a Judge in a court of juftice, fubject to a fuperior review, he would be within the reafon of the rule, which the law of *England* fays fhall be a juftification; but then it muft be pleaded. Here no fuch matter is pleaded, nor is it even in evidence that he fat as Judge of a court of juftice. Therefore I lay out of the cafe every thing relative to the *Arravel* of *St. Phillip's*.

The *firft* point then upon this ground is, the facrednefs of the defendant's perfon as Governor. If it were true that the law makes him that facred character, he muft plead it, and fet forth his commiffion as fpecial matter of juftification; becaufe *primâ facie* the Court has jurifdiction. But I will not reft the anfwer upon that only. It has been infifted, by way of diftinction, that fuppofing an action will lie for an injury of this kind committed by one individual againft another, in a country beyond the feas, but within the dominion of the crown of *England*, yet it fhall *not emphatically* lie againft the governor. In anfwer to which I fay, that for many reafons, if it did not lie againft any other man, it fhall *moft emphatically* lie againft the *governor*.

In every plea to the jurifdiction, you muft ftate another jurifdiction; therefore if an action is brought here for a matter arifing in *Wales*, to bar the remedy fought in this Court, you muft fhew the jurifdiction of the court of *Wales*; and in every cafe to repel the jurifdiction of the king's court, you muft fhew a more proper and more fufficient jurifdiction: for if

there

there is no other mode of trial, that alone will give the king's courts a jurisdiction. Now in this case no other jurisdiction is shewn, even so much as in argument. And if the king's courts of justice cannot hold plea in such case, no other court can do it. For it is truly said that a governor is in the nature of a viceroy; and therefore *locally*, *during his government*, no civil or criminal action will lie against him: the reason is, because upon process he would be subject to imprisonment. But here, the injury is said to have happened in the *Arraval* of *St. Phillip*'s, where without his leave no jurisdiction can exist. If that be so, there can be no remedy whatsoever, if it is not in the king's courts: because when he is out of the government, and is returned with his property into this country, there are not even his effects left in the island to be attached.

Another very strong reason, which was alluded to by Mr. Serjeant *Glynn*, would alone be decisive; and it is this: That though the charge brought against him is for a *civil* injury, yet it is likewise of a *criminal nature*; because it is in *abuse* of the authority delegated to him by the *king's letters patent*, under the great seal. Now if every thing committed within a dominion, is triable by the courts within that dominion, yet the effect or extent of the *king's letters patent*, which gave the authority, can only be tried in the king's courts; for no question concerning the seignory, can be tried within the seignory itself. Therefore, where a question respecting the seignory arises in the proprietary governments, or between two provinces of *America*, or in the *Isle of Man*, it is cognizable by the king's courts in *England* only. In the case of the *Isle of Man* * it was so decided

* 4 Inst. 284.

decided in the time of Queen *Elizabeth*, by the chief justice and many of the judges. So that *emphatically* the *governor* must be tried in *England*, to see whether he has exercised the authority delegated to him by the *letters patent*, legally and properly; or whether he has abused it, in violation of the laws of *England*, and the trust so reposed in him.

It does not follow from hence, that let the cause of action arise where it may, a man is not entitled to make use of every justification his case will admit of, which ought to be a defence to him. If he has acted right according to the authority with which he is invested, he must lay it before the Court by way of plea, and the Court will exercise their judgment whether it is a sufficient justification or not. In this case, if the justification had been proved, the Court might have considered it as a sufficient answer; and, if the nature of the case would have allowed of it, might have adjudged, that the raising a mutiny was a good ground for such a summary proceeding. I can conceive cases in time of war in which a governor would be justified, though he acted very arbitrarily, in which he could not be justified in time of peace. Suppose, during a siege, or upon an invasion of *Minorca*, the governor should judge it proper to send an hundred of the inhabitants out of the island, from motives of *real* and *general expediency*; or suppose, upon a general suspicion he should take people up as spies; upon proper circumstances laid before the Court, it would be very fit to see whether he had acted as the governor of a garrison ought, according to the circumstances of the case. But it is objected, supposing the defendant to have acted as the *Spa-*

nish governor was empowered to do before, how is it to be known here that by the laws and constitution of *Spain* he was authorised so to act. The way of knowing foreign laws is, by admitting them to be *proved* as *facts*, and the Court must assist the Jury in ascertaining what the law is. For instance, if there is a *French* settlement, the construction of which depends upon the custom of *Paris*, witnesses must be received to explain what the custom is; as evidence is received of customs in respect of trade. There is a case of the kind I have just stated*. So in the supreme resort before the king in council, the privy council determines all cases that arise in the plantations, in *Gibraltar* or *Minorca*, in *Jersey* or *Guernsey*; and they inform themselves, by having the law stated to them.—As to suggestions with regard to the difficulty of bringing witnesses, the Court must take care that the defendant is not surprised, and that he has a fair opportunity of bringing his evidence, if it is a case proper in other respects for the jurisdiction of the Court. There may be some cases arising abroad, which may not be fit to be tried here; but that cannot be the case of a governor, injuring a man contrary to the duty of his office, and in violation of the trust reposed in him by the king's commission.

Foreign laws must be proved as facts.

* Feaubert v Turst, Prec. Chan. 207.

If he wants the testimony of witnesses whom he cannot compel to attend, the Court may do what this Court did in the case of a criminal prosecution of a woman who had received a pension as an officer's widow: and it was charged in the indictment, that she never was married to him. She alleged a marriage in *Scotland*, but that she could not compel her witnesses to come up, to give evidence. The

D 2 Court

Court obliged the profecutor to confent that the witneffes might be examined before any of the judges of the Court of Seffion, or any of the barons of the Court of Exchequer in *Scotland*, and that the depofitions fo taken fhould be read at the trial. And they declared, that they would have put off the trial of the indictment from time to time, for ever, unlefs the profecutor had fo confented. The witneffes were fo examined before the Lord Prefident of the Court of Seffion.

It is a matter of courfe in aid of a trial at law, to apply to a court of equity, for a commiffion and injunction in the mean time; and where a real ground is laid, the Court will take care that juftice is done to the defendant, as well as to the plaintiff. Therefore in every light in which I fee the fubject, I am of opinion that the action holds *emphatically* againft the *governor*, if it did not hold in the cafe of any other perfon. If fo, he is accountable in this Court, or he is accountable no where; for the king in council has no jurifdiction. Complaints made to the king in council tend to remove the governor, or to take from him any commiffion, which he holds during the pleafure of the Crown. But if he is in *England*, and holds nothing at the pleafure of the Crown, they have no jurifdiction to make reparation, by giving damages, or to punifh him in any fhape, for the injury committed. Therefore to lay down in an *Englifh* court of juftice fuch a monftrous propofition, as that a governor acting by virtue of *letters patent* under the great feal, is accountable only to God, and his own confcience; that he is abfolutely defpotic, and can fpoil, plunder, and affect his Majefty's fubjects, both in their liberty and property, with im-

punity,

punity, is a doctrine that cannot be maintained.

In Lord *Bellamont*'s case, 2 *Salk*. 625, cited by Mr. *Peckham*, a motion was made for a trial at bar, and granted, because the *Attorney General* was to defend it on the part of the king; which shews plainly that such an action existed. And in *Way versus Yally*, 6 *Mod*. 195. Justice *Powell* says, that an action of false imprisonment has been brought here, against a governor of *Jamaica*, for an imprisonment there, and the laws of the country were given in evidence. The Governor of *Jamaica* in that case never thought that he was not amenable. He defended himself, and possibly shewed, by the laws of the country, an act of the assembly which justified that imprisonment, and the Court received it as they ought to do. For whatever is a justification in the place where the thing is done, ought to be a justification where the case is tried.—I remember, early in my time, being counsel in an action brought by a carpenter in the train of artillery, against Governor *Sabine*, who was governor of *Gibraltar*, and who had barely confirmed the sentence of a court-martial, by which the plaintiff had been tried, and sentenced to be whipped. The Governor was very ably defended, but nobody ever thought that the action would not lie; and it being proved at the trial, that the tradesmen who followed the train, were not liable to martial law; the Court were of that opinion, and the Jury accordingly found the defendant guilty of the trespass, as having had a share in the sentence; and gave £. 500 damages.

Vide Post XI.

The next objection which has been made, is a general objection, with regard to the mat-

ter arising abroad; namely, that as the cause of action arose abroad, it cannot be tried here in *England*.

Where an action must be laid in the proper county.

There is a *formal* and *substantial* distinction as to the *locality* of trials. I state them as different things:. the *substantial* distinction is, where the proceeding is *in rem*, and where the effect of the judgment cannot be had, if it is laid in a wrong place. That is the case of all ejectments, where possession is to be delivered by the *Sheriff* of the *county*; and as trials in *England* are in particular counties, the officers are county officers; therefore the judgment could not have effect, if the action was not laid in the proper county.

With regard to matters that arise *out* of the realm, there is a substantial distinction of locality too; for there are some cases that arise out of the realm, which ought not to be tried any where but in the country where they arise; as in the case alluded to by Serjeant *Walker*: if two persons fight in *France*, and both happening casually to be here, one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here; because, though it is not a criminal prosecution, it must be laid to be against the peace of the King; but the breach of the peace is merely local, though the trespass against the person is transitory. Therefore without giving any opinion, it might perhaps be triable only where both parties at the time were subjects. So if an action were brought relative to an estate in a foreign country, where the question was a matter of title only, and not of damages, there might be a solid distinction of locality.

But

But there is likewise a *formal* distinction, which arises from the mode of trial: for trials in *England* being by jury, and the kingdom being divided into counties, and each county considered as a separate district or principality, it is absolutely necessary that there should be some county where the action is brought in particular, that there may be a process to the sheriff of that county, to bring a jury from thence to try it. This matter of form goes to all cases that arise abroad: but the law makes a distinction between *transitory* actions and *local* actions. If the matter which is the cause of a transitory action arises within the realm, it may be laid in any county, the place is not material; and if an imprisonment in *Middlesex* it may be laid in *Surry*, and though proved to be done in *Middlesex*, the place not being material, it does not at all prevent the plaintiff recovering damages: the place of transitory actions is never material, except where by particular acts of parliament it is made so; as in the case of churchwardens and constables, and other cases which require the action to be brought in the county. The parties, upon sufficient ground, have an opportunity of applying to the Court in time to change the *venue*; but if they go to trial without it, that is no objection. So all actions of a transitory nature that arise abroad may be laid as happening in an *English* county. But there are occasions which make it absolutely necessary to state in the declaration, that the cause of action really happened abroad; as in the case of specialties, where the date must be set forth. If the declaration states a specialty to have been made at *Westminster* in *Middlesex*, and upon producing the deed, it bears date at *Bengal*, the action is

 gone

gone; because it is such a *variance* between the deed and the declaration as makes it appear to be a *different* instrument. There is some confusion in the books upon the *statute 6 Rich. II.* But I do not put the objection upon that statute. I rest it singly upon this ground: If the true date or description of the bond is not stated, it is a variance. But the law has in that case invented a fiction; and has said, the party shall first set out the description truly, and then give a *venue* only for form, and for the sake of trial, by a *videlicet*, in the county of *Middlesex*, or any other county. But no judge ever thought that when the declaration said in *Fort St. George, viz. in Cheapside*, that the plaintiff meant it was in *Cheapside*. It is a *fiction* of *form*; every country has its forms, which are invented for the furtherance of justice; and it is a certain rule, that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted. Now the fiction invented in these cases is barely for the mode of trial; to every other purpose, therefore, it shall be contradicted, but not for the purpose of saying the cause shall not be tried. So in the case that was long agitated, and finally determined some years ago, upon a fiction of the *teste* of writs taken out in the vacation, which bear date as of the last day of the term, it was held, that the fiction shall not be contradicted so as to invalidate the writ, by averring that it issued on a day in the vacation: because the fiction was invented for the furtherance of justice, and to make the writ appear right in form. But where the *true* time of suing out a *latitat is material*, as on a plea of *non assumpsit infra*

Fictions of law shall never be contradicted, so as to defeat the end for which they were invented; but for every other purpose they may be contradicted.

2 Burr. 967.

sex

ſex annos, there it may *be ſhewn* that the *latitat* was ſued out *after* the ſix years, notwithſtanding the *teſte*. I am ſorry to obſerve, that ſome ſayings have been alluded to, inaccurately taken down, and improperly printed, where the Court has been made to ſay, that as men they have one way of thinking, and as judges they have another, which is an abſurdity; whereas, in fact, they only meant to ſupport the fiction. I will mention a caſe or two, to ſhew that that is the meaning of it.

In 6 *Mod*. 228. the caſe of *Roberts verſus Harnage* is thus ſtated: the plaintiff declared that the defendant became bound to him at *Fort St. David's* in the *Eaſt Indies* at *London*, in ſuch a bond; upon demurrer the objection was, that the bond appeared to have been ſealed and delivered at *Fort St. David's*, in the *Eaſt Indies*, and therefore the date made it local, and, by conſequence, the declaration ought to have been of a bond made at *Fort St. David's*, in the *Eaſt Indies*, *viz.* at *Iſlington*, in the county of *Middleſex*; or in ſuch a ward or pariſh in *London*, and of that opinion was the whole Court. This is an inaccurate ſtate of the caſe. But in 2 Lord *Raym*. 1042, it is more truly reported, and ſtated as follows: It appeared by the declaration, that the bond was made at *London*, in the ward of *Cheap*; upon oyer, the bond was ſet out, and it appeared upon the face of it to be dated at *Fort St. George* in the *Eaſt Indies*; the defendant pleaded the variance in abatement, and the plaintiff demurred, and it was held bad: but the Court ſaid that it would have been good, if laid at *Fort St. George*, in the *Eaſt Indies*, to wit, at *London*, in the ward of *Cheap*. The objection there was, that they had laid it

falſely;

fallely; for they had laid the bond as made at *London*; whereas, when the bond was produced, it appeared to be made at another place, which was a variance. A cafe was quoted from *Latch*, and a cafe from *Lutwyche*, on the former argument; but I will mention a cafe pofterior in point of time, where both thofe cafes were cited, and no regard at all paid to them; and that is the cafe of *Parker* and *Crook*, 10 *Mod.* 255. It was an action of covenant upon a deed indented; it was objected to the declaration, that the defendant is faid in the declaration to covenant at *Fort St. George*, in the *Eaft Indies*; and upon the oyer of the deed it bore date at *Fort St. George*, and therefore the Court, as was pretended, had no jurifdiction; *Latch. fol.* 4. *Lutwyche* 950. Lord Chief Juftice *Parker* faid, that an action will lie in *England* upon a deed dated in foreign parts; or elfe the party can have no remedy; but then in the declaration a place in *England* muft be alledged *pro forma*. Generally fpeaking, the deed, upon the oyer of it, muft be confiftent with the declaration; but in thefe cafes, *propter neceffitatem*, if the inconfiftency be as little as poffible, it is not to be regarded; and here the contract being of a voyage which was to be performed from *Fort St. George* to *Great Britain*, does import, that *Fort St. George* is different from *Great Britain*; and after taking time to confider of it in *Hilary* term, the plaintiff had his judgment, notwithftanding the objection. Therefore the whole amounts to this; that where the action is fubftantially fuch a one as the Court can hold plea of, as the mode of trial is by jury, and as the jury muft be called together by procefs directed to the fheriff of the

county;

county; matter of form is added to the fiction, to ſay it is in that county, and then the whole of the enquiry is, Whether it is an action that ought to be maintained. But can it be doubted, that actions may be maintained here, not only upon contracts, which follow the perſon, but for injuries done by ſubject to ſubject; eſpecially for injuries where the whole that is prayed is a reparation in damages, or ſatisfaction to be made by proceſs againſt the perſon or his effects, within the juriſdiction of the Court? We know it is within every day's experience. I was embarraſſed a great while to find out whether the counſel for the plaintiff really meant to make a queſtion of it. In ſea batteries the plaintiff often lays the injury to have been done in *Middleſex*, and then proves it to be done a thouſand leagues diſtant on the other ſide of the *Atlantic*. There are caſes of offences on the high ſeas, where it is of neceſſity to lay in the declaration, that it was done upon the high ſeas; as the taking a ſhip. There is a caſe of that ſort occurs to my memory; the reaſon I remember it is, becauſe there was a queſtion about the juriſdiction. There likewiſe was an action of that kind before Lord Chief Juſtice *Lee*, and another before me, in which I quoted that determination, to ſhew, that when the Lords Commiſſioners of prizes have given judgment, that is concluſive in the action; and likewiſe when they have given judgment, it is concluſive as to the coſts, whether they have given coſts or not. It is neceſſary in ſuch actions to ſtate in the declaration, that the ſhip was taken, or ſeiſed *on the high ſeas, videlicet*, in *Cheapſide*. But it cannot be ſeriouſly contended that the judge and jury who try the

caufe, fancy the fhip is failing in *Cheapfide:* no, the plain fenfe of it is, that as an action lies in *England* for the fhip which was taken on the high feas, *Cheapfide* is named as a *venue*; which is faying no more, than that the party prays the action may be tried in *London*. But if a party were at liberty to offer reafons of fact contrary to the truth of the cafe, there would be no end of the embarraffment. At the laft Sittings there were two actions brought by *Armenian* merchants, for affaults and trefpaffes in the *Eaft Indies*, and they are very ftrong authorities. Serjeant *Glynn* faid, that the defendant, Mr. *Verelft*, was very ably affifted: fo he was, and by men who would have taken the objection, if they had thought it maintainable, and the actions came on to be tried after this cafe had been argued once; yet the counfel did not think it could be fupported. Mr. *Verelft* would have been glad to make the objection; he would not have left it to a jury, if he could have ftopped them fhort, and faid, You fhall not try the actions at all. I have had fome actions before me, rather going further than thefe tranfitory actions; that is, going to cafes which in *England* would be local actions: I remember one, I think it was an action brought againft Captain *Gambier*, who by order of Admiral *Bofcawen*, had pulled down the houfes of fome futlers who fupplied the navy and failors with fpirituous liquors; and whether the act was right or wrong, it was certainly done with a good intention on the part of the admiral, for the health of the failors was affected by frequenting them. They were pulled down; the captain was inattentive enough to bring the futler over in his own fhip, who would never have got to *England* otherwife;

otherwiſe; and as ſoon as he came here he was adviſed that he ſhould bring an action againſt the *Captain*. He brought his action, and one of the counts in the declaration was for pulling down the houſes. The objection was taken to the count for pulling down the houſes; and the caſe of *Skinner* and the *East India* Company was cited in ſupport of the objection. On the other ſide, they produced from a manuſcript note a caſe before Lord Chief Juſtice *Eyre*, where he over-ruled the objection; and I over-ruled the objection upon this principle, namely, that the reparation here was perſonal, and for damages, and that otherwiſe there would be a failure of juſtice; for it was upon the coaſt of *Nova-Scotia*, where there were no regular courts of judicature: but if there had been, Captain *Gambier* might never go there again; and therefore the reaſon of locality in ſuch an action in *England* did not hold. I quoted a caſe of an injury of that ſort in the *East Indies*, where, even in a court of equity, Lord *Hardwicke* had directed ſatisfaction to be made in damages: that caſe before Lord *Hardwicke* was not much conteſted, but this caſe before me was fully and ſeriouſly argued, and a thouſand pounds damages given againſt Captain *Gambier*. I do not quote this for the authority of my opinion, becauſe that opinion is very likely to be erroneous, but I quote it for this reaſon; a thouſand pounds damages, and the coſts, were a conſiderable ſum. As the captain had acted by the orders of Admiral *Boſcawen*, the repreſentatives of the admiral defended the cauſe, and paid the damages and coſts recovered. The caſe was favourable; for what the
admiral

admiral did was certainly well intended; and yet there was no motion for a new trial.

I recollect another cause that came on before me; which was the case of Admiral *Palliser*. There the very gist of the action was local: it was for destroying fishing huts upon the *Labrador coast*. After the treaty of *Paris*, the *Canadians* early in the season erected huts for fishing; and by that means got an advantage (by beginning earlier) of the fishermen who came from *England*. It was a nice question upon the right of the *Canadians*. However, the admiral, from general principles of policy, ordered these huts to be destroyed. The cause went on a great way. The defendant would have stopped it short at once, if he could have made such an objection, but it was not made. There are no local courts among the *Esquimaux Indians* upon that part of the *Labrador coast*; and therefore whatever injury had been done there by any of the king's officers, would have been altogether without redress, if the objection of locality would have held. The consequence of that circumstance shews, that where the reason fails, even in actions which in *England* would be local actions, yet it does not hold as to places beyond the seas, within the king's dominions. Admiral *Palliser*'s case went off upon a proposal of a reference, and ended by an award. But as to transitory actions, there is not a colour of doubt but that every action that is transitory may be laid in any county in *England*, though the matter arises beyond the seas; and when it is absolutely necessary to lay the truth of the case in the declaration, there is a fiction of law to assist you, and you shall not

not make uſe of the truth of the caſe againſt that fiction, but you may make uſe of it to every other purpoſe. I am clearly of opinion not only againſt the objections made, but that there does not appear a queſtion upon which the objections could ariſe.

The three other Judges concurred.

Per Cur', Judgment affirmed.

I had ſome thoughts of ſhortening the Pleadings *in this caſe, but after conſidering how much they contribute to the underſtanding of the arguments, I thought it adviſeable to let them ſtand, as reported by Mr.* Cooper.

IX. Of other Matters respecting new Trials, &c.

(3.) *Of imperfect Verdicts.*

M. 26. Car. 2. B.R. 1 Sid. 234.
Verdict quod locutus est verba, in an action for words is imperfect.

NOTA—*Twisden* J. said that it had been adjudged, where in an action for words the defendant pleaded not guilty, and the Jury found *quod locutus est verba*—that this verdict was imperfect, and the plaintiff could not have judgment.

Vide post Rex v. Woodfall.

Matthews v. Hopkins, E. 17 Car. 2. B. R. 1 Sid. 244.
Action upon the case against a carrier, and trover in the same declaration seem bad.
Dy. 35. b.
1 Vent. 365.
1 Keb. 870.

In an action upon the case, the plaintiff declared upon the custom of the realm, and that the defendant on the 10th of *May* was a common carrier, and the plaintiff the 6th of *May* was possessed of £. 50. and that afterwards, on the same day and year last-mentioned, he delivered it to the defendant to carry, and he neglected so to do, &c. And he also declared in trover for the same sum, and the defendant pleaded not guilty, and verdict for the plaintiff generally, and it was moved in arrest of judgment.

It seems that the custom of the realm ought to be recited in an action against a carrier. Qu.?
2 Cro. 224. 242.

1st. Because he had not well recited and shewn the custom of the realm, and had not alledged that he was a carrier at the time of the delivery, but some days after:

And also that trover and an action upon the case may not be joined, because the one is

founded upon a *tort*, and the other upon custom.

. But on the other part it was answered, that the declaration is good enough; for as to joining of trover and case, one plea goes to the whole, scil. *Not guilty.* And as to the mis-recital of the custom of the realm, it is part of the common law, and therefore the declaration is good enough without recital, and a bad recital does not vitiate in such case.

And there is a diversity between the recital of the common law, and of a statute; for if a general statute is mis-recited, this makes the declaration bad, because the law is formed in words in which there is not any variance, but if the action is founded upon the common law, and the custom is mis-recited, yet the declaration is good, because this is not written law, and formed in words, but the substance of it well known.

Diversity between the common law and statute as to recitals. Plow. 84. 1 Cro. 96, 168. 2 Cro. 224. Hob. 310. 4 Co. 13. a. 10 Co. 57.

But *per Curiam* the declaration and verdict are bad, for although *not guilty* may go to both, yet the verdict ought not to be for the plaintiff generally, and although the declaration may be good without recital of the custom of the realm, as *Hob.* says, yet the better way is to recite it. *Vide Sid.* 181, 233, 244. *V.* 2 *Rol. Rep.* 140.

Not guilty may be a good issue where the verdict may not be general. Hob. 249. Vide the case of Beringsage and Ralston. M. 34. Car. 2. B. R. 1 Cro. 20.

In *Mast versus Goodson*, *M.* 13. *G.* 3. *C. B.* 3 *Wils.* 348. Plaintiff declared for a tortious obstruction of an *easement* (which he held under an agreement from the defendant); and added a count in *trover*. The Court was of opinion the latter count might well be joined with the former, that being founded upon *tort*.

Rex. v. Woodfall. M. 11 Geo. III. B. R. 5 Bur. 2661. Tuesday 20th November, 1770. Information for a libel—Verdict, defendant guilty of the printing and publishing, only.

This cause first came before the Court on *Friday* 22d *June* 1770.

Mr. *Lee* then moved, on behalf of the defendant, to *stay the entering up judgment against him*, upon the verdict found in this cause.

A cross-motion was made at the same time, by the counsel for the Crown, for the defendant to shew cause why the verdict should not be entered according to the *legal import of the finding* of the Jury.

It was an information against the defendant, by the Attorney-General, for printing, and publishing in the Public Advertiser, a seditious libel signed *Junius*.

Upon the trial, the Jury found him *guilty* of the *printing* and *publishing*, ONLY.

The Court granted rules to shew cause, upon each of these two adverse motions; and ordered them both to be brought on upon the same day.

Accordingly, on *Tuesday* 3d *July* 1770, cause was reciprocally shewn on each.

Serjeant *Glynn* and Mr. *Lee* argued for the defendant: Mr. *Thurlow*, (Solicitor General) Mr. *Morton*, Mr. *Wallace*, Mr. *Dunning*, and Mr. *Walker*, for the Crown.

On the part of the defendant, it was insisted that the verdict, *as found*, did not amount to find Mr. *Woodfall* guilty of the charge in the information; but rather to acquit him of it. For, he is charged with printing and publishing this as a libel, with a *malicious and criminal intention:* But the Jury find him guilty of printing and publishing, *only*. Whatever the Jury do not find implies a negative: but this goes further; it says expressly, that they find this and this *only*.

A *criminal*

A *criminal motive* goes to the conſtruction of the offence: a *criminal intention* is its *eſſence*. And this the Jury have negatived.

They are *judges of law and fact*, as far as law is involved in fact. They *may* take this upon them: and here they *have* done ſo. They meant to acquit him of all criminal intention: and one of the jurymen has made an affidavit, "That he meant to acquit him of "all criminal conſtruction: and if he had "thought that that could not have been thus "done, he would have acquitted him." Therefore this cannot be conſidered as a verdict of conviction by twelve jurymen. A verdict ought to be found clearly, fully, and diſtinctly: it cannot be ſupplied by inference; neither can it be amended by any notes of the aſſociate, in a criminal caſe. 1 *Salk.* 53, *Rex* v. *Bold.* 1 *Salk.* 47, *Rex* v. *Keate.*

They alſo cited *Cro. Jac.* 210, *Cooke* v. *Laneday*; and *Yelverton* 106; and *Drury* v. *Dennis*; 2 *Rolle*'s *Abridgment*, 693. Title, "Verdict," Letter, *S. pl.* 5. between *Baugh* and *Philips*, referred to by Ld. Ch. J. *Vaughan*, in the caſe of *Rowe* v. *Huntington*, *Vaughan*, 75, 76. Who there ſays, "That finding the point "in iſſue, by *way of argument*, in a general "verdict, is never permitted; not though "the argument be neceſſary and concluſive." There can be no ſupply by intendment, in any caſe; much leſs in the preſent, where it is impoſſible to ſupply the verdict by intendment, becauſe nobody can know what the Jury did intend, or by what rule, or upon what principle they decided; unleſs affidavits from the Jurymen were allowed to be read. Another authority that they cited, was the caſe of *Shelley* v. *Alſop*, in *Yelverton*, 77, 78,

which was a finding of the assumpsit by foreign implication; "which is not good," as it is there said, "upon any general issue:" and it is there laid down, "that the Jury ought to "give their verdict precisely according to "their charge."

They insisted, that the verdict ought to remain in the *words* of the Jury; without expunging any of their words, or substituting others in their places, or controlling them under any pretence of legal construction. They ought to be left as they stand; that the defendant may have the benefit of a writ of error to the House of Lords; if the opinion of this Court should be against him.

They hoped, however, that the present finding would be esteemed by the Court to amount to an *acquittal* of the defendant.

But, if the Court should not go so far as to hold it tantamount to an acquittal, there ought, at least, to be a *venire facias de novo*. It certainly is not a conviction: and if it be not an acquittal, it can be no more than an imperfect verdict. And if a verdict be *imperfect*, there must be a *venire facias de novo*. But we hope for his discharge, as upon a verdict of not guilty.

On the part of the prosecution, it was argued that the present verdict could not be considered as a verdict of not guilty. 'It positively and explicitly finds him *guilty* of the *printing and publishing*: and it does not import any negation of his guilt, as to the rest. 'The word "*only*" does not import the exclusion of any thing but *facts*: it cannot exclude *conclusion of law*.

'It is certain that a verdict cannot be amended in matters of *fact*: but it may be perfected

perfected in point of *form*. The officer takes his note short: but the necessary finishing of the sentence may be supplied.

The substance and matter of this issue is sufficiently found: the Court may order it into a proper form. The *law* here implies the intention. The printing and publishing was all that the Jury were to inquire about. This verdict is not imperfect: nor is there any need of supplying any thing by *intendment*. The intention must be collected from the libel itself. The intention is the gist of the offence. The verdict ought to be entered according to the true meaning and intention of the Jury. *Something* is always to be added to *every* verdict: the entry is never in the very identical words used by the Jury; which are always concise, and not full and formal enough to stand supported against a writ of error.

Whether a jury *may* or may not take upon themselves to judge of matters of law, they must at least do it at their peril. But here they have not done it at all: they have not determined, that this paper is *not* libellous.

So that whether they may at their peril do it, or whether they may not, they have not here risqued that peril. The import of their verdict is a general finding of the *facts*, without expressing any sense of their own upon the *law*.

In the case of the *King* against *Beere*, reported in 12 *Mod.* 218. 2 *Salk.* 217. 1 Lord *Raym.* 414. *Carthew*, 407. and *Holt*, 422. the Jury, as to the *writing* and *collecting* of the libels only, find him guilty, *prout in indictamento supponitur*: and as to all other things charged in the indictment, *præter scriptionem*

et collectionem, they find him not guilty. The charge was for composing, making, writing, and collecting several scandalous, false, and seditious libels. The finding was—" quoad " scriptionem et collectionem libellorum in " indictamento mentionat' tantum, quod de- " fendens est culpabilis; et quoad totum re- " siduum in eodem indictamento content', " quod defendens non est inde culpabilis." It was holden " that the bare writing and col- " lecting the libellous matter was criminal," and " that the general finding shall be taken " to be criminal;" and *Turton* and *Rokeby* cited some cases to prove, " that the writing " of a libel, without publishing it, was pu- " nishable by indictment."

They also cited *Moore*, 194. *Dyer*, 362. *Hobart*, 54. *Moore*, 888. 2 *Lev.* 111. and, to prove that the word " only" might be rejected, 2 *Saunders*, 380. *Co. Litt.* 227.

Serjeant *Glynn* replied; enforcing the former argument, and denying that the case of *Beere*, or other cases now cited, were like the present case.

Lord MANSFIELD—It is much too late in this term, for any thing to be further done in this cause, with any effect. Let it stand over to next term.

Cur' advis'.

On this day (*Tuesday* 20th *November* 1770) his LORDSHIP delivered the opinion of the Court;

This comes before the Court upon *two* rules: The *first* (obtained by the *defendant*) " to *stay* " the entering up judgment on the verdict in " this cause;" the *second* (obtained by the Attorney General) " that the verdict may be " entered

" entered *according to the legal import* of the
" finding of the Jury."

The last rule must, from the nature of it, be first discussed; because the ground of argument upon the other cannot be settled, till this is disposed of.

Upon *this* rule, it is necessary to *report* the trial.

The prosecution is an information against the defendant, for *printing and publishing* a libel, in the Public Advertiser, signed " JU-
" NIUS:" The tenor of which is set out, with proper AVERMENTS as to the *meaning* of the libel, the *subject matter*, and the *persons*, concerning which and of whom it speaks; with INNUENDOS filling up all the blanks, and the USUAL EPITHETS.

In support of the prosecution, they proved, by *Nathaniel Crowder*, " that He bought the
" paper produced and twelve more, from *Col-*
" *field*, the defendant's publisher, in the de-
" fendant's publishing room at the corner of
" *Ivy Lane*; that he goes often there; has
" occasionally seen the printing-room; and
" has had papers in the printing-room."

They *read* the paper produced: and the tenor *agreed* with the information.

George Harris, register of pamphlets and news-papers, proved " that the defendant, by
" himself and servants, paid the duty for ad-
" vertisements in the Public Advertiser. That
" the defendant had paid, himself; and all
" the payments were on his account: That
" the defendant has made the usual affidavit;
" and has been allowed the stamp duty for
" such papers as were unsold. That the du-
" ties for advertisements in the paper in ques-
" tion were paid by the defendant's servant; and

 " the

"the receipt given on the defendant's ac-
"count."

William Lee, clerk to Sir *John Fielding*, proved "That he often carried advertise-
"ments for the Public Advertiser, to the de-
"fendant's at the corner of *Ivy Lane*. That
"he generally paid ready money. That he
"has seen money paid to the defendant for
"advertisements; and he had a receipt from
"the defendant, signed by him, the 29th of
"*November*, for £. 32, for printing advertise-
"ments in the Public Advertiser."

On the part of the *defendant*, they called no witnesses.

His counsel objected *to some* of the INNUENDOS: but they *principally* applied to the Jury, to acquit the defendant, from the paper being INNOCENT, or *not liable to the* EPITHETS given it by the information; or, that the defendant's intent in publishing did *not deserve the epithets* in the information.

There was no doubt but that the evidence, *if credited*, amounted to *proof* of *printing and publishing by the defendant*.

There *may* be cases where the fact proved as a publication may be *justified* or *excused* as lawful or innocent. For, no fact which is *not criminal* in case the paper be a libel, can amount to a publication of which a defendant ought to be found *guilty*.

But *no* question of *that* kind arose in *this* cause.

Therefore I directed the Jury to consider "Whether *All the* "*innuendos*" and *all the ap-*
"*plications* to matter and persons *made by the*
"*information*, were, in *their* judgment, the
"TRUE MEANING of *the paper*." If they thought *otherwise*, they should *acquit* the defendant;

fendant: but if they *agreed with the information*, and *believed* the evidence as to the *publication*, they ſhould find him *guilty*.

If the Jury were *obliged* to find whether the paper was *a libel*, or whether it was a libel to *ſuch a degree* as to deſerve the epithets given it by the information; or to *require proof of the expreſs intent* of the defendant in printing and publiſhing, and of its being *malicious to ſuch a degree* as to deſerve the epithets given it by the information, *then* this direction was *wrong*.

In ſupport of it, I told them (as I have, from indiſpenſible duty, been obliged to tell *every* jury upon every trial of this kind) to the following effect.

That, "Whether the paper, meaning as "alledged by the information, was *in law* a "LIBEL," was a *queſtion of law*, upon the *face of the record*: for, after conviction, a defendant may move in arreſt of judgment, if the paper is *not* a libel.

That all the *epithets in the information* were *formal inferences of law*, from the *printing* and *publiſhing*.

That *no proof* of *expreſs* malice ever was required; and, in moſt caſes, is impoſſible to be given.

That the verdict finds only what the *law infers* from the fact. Therefore, *after* conviction, a defendant may, by affidavit, leſſen the *degree* of his guilt.

That where an act *in itſelf indifferent*, if done with a particular intent *becomes* criminal; *there* the *intent* muſt be *proved and found*: but where the act is in itſelf *unlawful*, (as in this caſe) the proof of juſtification or excuſe lies on the *defendant*; and in failure thereof, the *law implies* a criminal intent.

The

The Jury ſtaid out a great while, many hours. At laſt, they came to my houſe; (the objection "of its being *out of the county*" being cured by *conſent.*) In anſwer to the uſual queſtion put by the officer, the Foreman gave their verdict in theſe words—"*Guilty* of the "*printing and publiſhing*, ONLY." Nothing more paſſed.

The officer has entered up the verdict *literally*; without ſo much as adding the uſual words of reference, to connect the verdict with the matter to which it related. Upon this, the *two* rules I have ſtated were moved for.

Upon that obtained by the *Attorney General*, *the affidavit of a juror* was offered by the counſel for the defendant.

But We are all of opinion, "that it can *not* "be received."

Where there is a doubt, upon the Judge's report, as to what paſſed at the time of bringing in the verdict; *there* the *affidavits* of jurors or by-ſtanders *may* be received, upon a motion "for a NEW trial," or to rectify a miſtake in the "minutes:" But an *affidavit of a juror* never can be read, as to what he then *thought or intended.*

This motion conſiſts of *two* parts: Firſt, "to fill up the *formal* words of reference;" the ſecond, "to omit the word *only*."

We are all of opinion, "that the *firſt* is a "*technical* omiſſion of the clerk; and *ought to* "*be ſet right*:" as to the *ſecond*, "that the "word ONLY *muſt ſtand* in the verdict."

There is *no ground* from any thing which paſſed, to explain the ſenſe of the Jury ſo as that the officer might have entered *a general* verdict.

No argument can be urged for *omitting* the word

word "*only*," which does not prove "that "it can have *no effect though inserted*."

And therefore it is a question of law, upon the face of the verdict.

THE DEFENDANT'S motion must be considered upon the ground of the word "*only*" STANDING. Was it *omitted*, there could be *no* doubt.

"Guilty of printing and publishing," where there is no other charge, is "GUILTY:" For, *nothing more* is to be *found* by the JURY.

In the case of the King and *Williams*, the Jury found the defendant guilty of printing and publishing the North Briton, "N° 45." The clerk entered it up, "GUILTY." And no objection was ever made.

Where there are *more* charges than one, guilty of some, "*only*," is an *acquittal* as to the *rest*.

But in *this* information, there is *no* charge *except* for printing and publishing.

Clearly, there can be *no* judgment, of ACQUITTAL; because the fact found by the Jury is the *very crime* they were to try.

The *only* question is, Whether, by any possibility, the word "only" can "have a meaning which would *affect* or *contradict* the "verdict."

"That the *law*, as to the subject matter of "the verdict, *is* as I have stated," has been so often unanimously *agreed by the whole Court*, upon every report I have made of a trial for a libel, that it would be improper to make it a question *now*, in this place.

Among those that concurred, the Bar will recollect the *dead* and the *living not now here*.

And we all *again* declare our opinion, "that the direction is *right* and *according to* "law."

This direction, though often given with an express request from me, "that if there was "the least doubt, they would move the "Court," has never been complained of in Court. And yet, if it had been wrong, a new trial would be of course. It is not *now* complained of.

Taking then the law to be according to this direction, the question is, "Whether any "meaning can be put upon the word "only," "as it stands upon the record, which will *af*-"*fect* the verdict."

If they meant to say "they did not find it a "*libel*," or "did not find the *epithets*," or "did not find any *express* malicious intent;" it would *not* affect the verdict; because *none of these* things were to be proved, or found *either* way.

If, by "only," they meant to say, "that "they did *not* find the MEANING *put upon the* "*paper by the information*;" they *should have* ACQUITTED him.

If they had *expressed* this to be their meaning, the verdict would have been *inconsistent* and *repugnant*; for they ought *not* to find the defendant guilty, *unless* they find the *meaning put upon the paper by the information:* and judgment of *acquittal* ought to have been entered up.

If they had *expressed* their meaning in any of the *other* ways, the verdict would *not* have been affected; and *judgment* ought to be entered upon it.

It is impossible to say, with certainty, *What* the Jury really "*did* mean." Probably they had *different* meanings.

If

If they could poffibly mean *that* which, *if expreffed*, would *acquit* the defendant, he ought not to be concluded by this verdict.

It is poffible, *fome* of them might mean not to find the *whole* fenfe and explanation put upon the paper by the innuendos in the information.

If a doubt arifes from an ambiguous and unufual word in the verdict, the Court ought to lean in favour of a *venire de novo*.

We are under the *lefs* difficulty; becaufe, in favour of a *defendant*, though the verdict be *full*, the Court may grant a new trial.

And we are all of opinion, upon the whole of the cafe, "that there fhould be a VENIRE "DE NOVO.'

Mr. Attorney General faid, the *original* paper was loft; or, at leaft, was never returned back.

LORD MANSFIELD. Nothing of that fort will vary the juftice of the judgment.

IX. Of other Matters respecting new Trials, &c.

(4.) Of New Trials on the Ground of Irregularity, &c.

Vide ante VI. *Leeman versus Allen*, and others; *et* VII. *Russell versus Ball.*

Vicary v. Farthing, E. 38 Eliz. Mo. 451. n. 616. Delivering written evidence to the Jury by one of the solicitors, which evidence had been produced in court.

AT *nisi prius* the issue was upon *full age*, and two church-books were given in evidence; one of which was delivered to the Jury in court by consent of the parties, and the other was afterwards delivered to the Jury out of court, by the solicitor on one side, without the consent of the Court, and this was indorsed upon the *postea*. The question was, If the verdict should be void? And the Justices differed in opinion, *Popham* and *Gawdy* that it should not; *Fenner* and *Clench*, that in the case of *Landy* and *Metcalfe* in C. B. 33 *Eliz.* it was agreed to be good law, where the Jurors being consulting upon their verdict, and seeing out of the window one of the witnesses, they called to him, and desired that he would again declare to them what he had testified in Court, and he did, and nothing more; yet for this the verdict was adjudged void. But in the principal case, the book was delivered in evidence, and the other party had answered to it. Therefore *quære? Nota.* the books for avoiding a verdict, 14 *H.* 7. fo. 1, 2. *Doctor*

V. Mo. 452.

et

et Student, fo. 126. 4 *Ma. Bro. Verdict*, 477. 11 *H.* 4, 16. 35 *H.* 6. *Fitz. Examination*, 17.

If the defendant appears and makes defence, he shall never have a new trial, for want of due notice.

Thermolin v. Cole, H. 8. W. 3. B. R. 2 Salk. 646.
No new trial for want of notice after defence.

This * was an action of trespass for cutting down and carrying away twenty trees of plaintiff's. As to twelve of the trees, defendants justified for estovers; and as to the remaining eight, pleaded not guilty, and two separate issues were joined thereupon.

* Southeby v. Day and others. H. 7. Geo. 2. Barnes, 154.
Just verdict for plaintiff, and moderate damages not set aside for small irregularity.

At the trial the merits were fully determined as to the issue joined upon the justification for estovers; but plaintiff gave no evidence upon the Not Guilty, and no notice being taken thereof, the Jury found a verdict for plaintiff generally, and gave five shillings damages, but omitted to acquit the defendants on the Not Guilty; whereupon defendants moved to set aside the verdict, and obtained a rule to shew cause, which was afterwards discharged on hearing counsel on both sides. The verdict appearing to be just, and the damages moderate, the Court would not overturn the verdict; but left plaintiff to enter up his judgment as he should be advised.

Baynes for defendants. *Chapple* for plaintiff.

The words (*and the said plaintiff likewise*) after issue rendered by defendant, were omitted in the issue delivered; but inserted in the record of *nisi prius*. *Burnett* moved to set aside the verdict, insisting upon this as a material variance, and had a rule to shew cause. But it appearing that Mr. *Lacy*, defendant's counsel, at the trial, had objected to the evidence

Grave v. Cliffe. E. 12 Geo. 2. Barnes 445.
Similiter omitted.

given by plaintiff in point of law, (which is making defence) though he did not croſs examine, the rule was diſcharged. *Comyns* and *Draper* for plaintiff; *Eyre* and *Burnett* for defendant.

Thompſon v. Simmons, E. 6 Geo. 2. Barnes, 475. Variance between niſi prius record and iſſue. Vide Poſt Fitch and Nunn.

Darnal moved to ſet aſide the verdict, the record of *niſi prius* differing from the iſſue-book delivered, the defendant's name being inſerted in the paper-book, in joining iſſue, inſtead of plaintiff's; but in the record plaintiff's name was inſerted, and the iſſue properly joined; but two iſſues being joined, and a general verdict found for plaintiff, Court refuſed to make any rule.

Norman v. Beaumont, in treſpaſs and aſſault in Norfolk, M. 18. G. 2. Barnes, 453. A wrong juryman ſworn, verdict ſet aſide.

Richard Geater, ſummoned and returned as a *niſi prius* juror, did not attend the Aſſizes; but one *Richard Sheppard*, a freeholder, who was verbally ſummoned to ſerve as a juror on the Crown ſide, and never had been at the Aſſizes before, did attend both courts (as he imagined himſelf in duty bound to do); when *Richard Geater* was called on the *niſi prius* ſide, *Richard Sheppard* (thinking himſelf called) anſwered, and was ſworn as a juror.

Defendant inſiſted, that the verdict was null and void, the trial not having been by twelve but by eleven jurors only.

Neither party knew any thing of the miſtake till after the trial. It was urged for plaintiff, that defendant ought to have challenged *Sheppard*; that after recording the verdict, no averment can be admitted againſt the record. That *Sheppard*'s place of abode was different from that of *Geater*, which would have been good matter of challenge. And if defendant could aver againſt the record, yet the

the defect is cured by the ſtatute 32 H. 8. c. 30. The verdict was for plaintiff, damages one ſhilling; and Lord Chief Juſtice *Lee*, who tried the cauſe, had certified, to entitle plaintiff to coſts. *Per Cur'*. By the ſtatute 3 Geo. 2. all the twelve jurors ought to be drawn out of the box, and the name of *Richard Sheppard* was never put into the box. The Court are not bound by the record. Here has been no trial. This is not matter of challenge, nor is the defect cured by the ſtatute 32 H. 8. The rule on *Richard Sheppard* to ſhew cauſe why an attachment, was diſcharged. The rule to ſhew cauſe why the verdict ſhould not be ſet aſide, was made abſolute. *Prime* for plaintiff; *Bootle* for defendant; *Leeds* for *Richard Sheppard*.

Wrey *v.* Thorn, M. 18 G. 2. Barnes, 454. Motion for new trial, the chriſtian name of one of the jurors being miſtake.

This was an action for breaking and entering plaintiff's cloſe, *&c.* Defendant juſtified in right of a way. Plaintiff replied *extra viam*; whereon iſſue was joined; and a ſpecial Jury and view applied for and granted. The name of *Henry Luppincott* of *Alverdiſcott*, in *Com'* *Devon*, Eſquire, was taken out of the freeholders book, and he ſtood as a juryman, and was returned among the other jurors, in the pannel annexed to the writ of *Venire facias*; and was ſummoned, and did attend both on the view and at the trial. After a verdict for plaintiff on the merits of the cauſe, defendant moved to ſet aſide the verdict, Mr. *Luppincott's* chriſtian name being *Harry* and not *Henry*; and produced an affidavit thereof from two perſons. *Per Cur'*, this affidavit ought not to be received in a motion for a new trial. The record, and all the jury proceſs, are uniform. Mr. *Luppincott* is the real perſon re-

turned and intended to be a juror, and there is no pretence that the verdict is unjuſt. It is commonly underſtood that *Henry* and *Harry* are the ſame name; or that *Harry* is the ſame name as *Henry* corruptly ſpelt. The rule to ſhew cauſe why the verdict ſhould not be ſet aſide, was diſcharged. *Belſield* for plaintiff; *Huſſey* for defendant.

Love and Appleton, v. Jarrett. E. 19 G. 2 Barnes, 4[illegible]. Paper-book received and paid for, but returned on diſcerning the replication to be bad, with notice of the miſtake. Ver[illegible] obtained without [illegible] defence ſet aſide.

Defendant had time to plead by a judge's order, rejoining *gratis*. Plaintiff delivered a paper-book, containing a bad replication, and an iſſue joined by defendant. Defendant's agent's clerk received and paid for the paper-book; but his maſter perceiving the replication to be bad, returned the book to plaintiff's agent, and gave notice of the miſtake, notwithſtanding which plaintiff went on to trial, and had a verdict, without defence. Rule abſolute to ſet aſide the verdict, without coſts. *Skinner* for plaintiff; *Draper* for defendant.

[illegible] againſt Young. M. 20 G. 2. Barnes, 4[illegible]. Verdict for defendant in replevin (who brought down the record) ſet aſide, the plaintiff not appearing.

In *replevin*, plaintiff did not appear at the aſſizes, defendant brought down the record, and his counſel inſiſting ſtrongly on a verdict, Mr. Baron *Reynolds*, before whom the cauſe was tried, complied, and a verdict was found for defendant, though plaintiff did not appear. Upon application by plaintiff to ſet aſide the verdict, the Court, after hearing the Judge's report, ordered the *poſtea* to be amended, and a nonſuit to be returned inſtead of a verdict for defendant; and that defendant ſhould pay coſts of the motion. *Prime* for plaintiff; *Draper* for defendant.

In

In *ejectment*; the *Venire facias* was awarded by mistake, returnable on the morrow of the *Ascension*, instead of eight days of the *Purification*. Defendants, though their witnesses attended the assizes, made no defence at the trial, but confessed lease, entry, and ouster, and suffered plaintiff to take a verdict, relying on the mistake in awarding the *venire*, returnable at a day subsequent to the assizes, 'till after which return, and default by jurors, there could be no *nisi prius*. The jury process was made returnable at the proper day: the Court held the variance material, on the authority of two cases cited by plaintiff's counsel, *Bastard & al. versus Bartlett, T. 3 G. 2. Dale versus Holmes, M. 4 G. 2.* in *B. R.* Verdict set aside on payment of costs. *Prime* for defendants; *Draper* and *Wynne* for plaintiff.

Wooden, on the demise of Long against Saunders, widow, and other. E. 23 G. 2. Barnes, 460.

Verdict set aside, the venire being returnable at a day after the assizes.

MORTON, *per Draper* for defendant, for a new trial, after verdict for plaintiff, in an action upon a penal statute (wherein no defence was made at the trial) founded on a variance between the issue delivered and the record of *nisi prius*, the words following, (*viz.*) *And thereupon the said plaintiff, by* George Boldero, *his attorney, saith*, being omitted in the issue delivered, though put into the record. This was admitted not to be a material variance affecting the merits, and in civil actions helped by the statute of *Jeofails*, but not in an action on penal statute. In actions brought by original writ, the method is to recite the writ, and then to count; here is nothing but recital, without any count. By stat. 18 *Eliz.* a particular method is prescribed to the prosecutor; he must declare in person, or by attorney. Plaintiff, in this case, may, possibly,

Fitch qui tam against Nunn. E. 26 G. 2. Barnes, 464.

Variance between the issue and nisi prius record.

Vide post IX. (11.) the same cause.

Vide ante Thompson v. Simmons.

possibly, be under twenty-one years of age, and, if so, cannot support this action, wherein he cannot declare by his *prochein amy*.

The Court, after hearing *Prime pro quer'*, did not incline to think the variance material, or to favour the distinction made *per Draper*. But as plaintiff's agent had made a blunder, and the merits had not been tried, ordered a new trial, and costs to attend the event. *Vide post* IX. (11.)

Griffiths v. Williams. E. 27 G. 3. B. R. Durnford and East, 1 V. 710.
Paying money into court, where the demand is for unliquidated damages, by a judge's order after plea pleaded, is irregular; but if the plaintiff take the money out, he thereby waives the irregularity, and cannot afterwards have a verdict, unless he recover more than the sum paid in.
The plaintiff is bound by the acts of his attorney's agent in town.

This was an action against the defendant as an attorney for negligence in not entering up judgment, on a warrant of attorney, against a creditor of the plaintiff, by which he had lost his security. The defendant pleaded the general issue, and afterwards obtained a judge's order for paying money into court. Notice was given to the defendant by the plaintiff's attorney, that the payment was irregular, and that he should not take the money out of court; but about ten days before the trial, the plaintiff's agent took the money out of court, and afterwards the plaintiff obtained a verdict for the exact sum paid into court.

On a former day, *Bower* obtained a rule to shew cause why the verdict which had been given for the plaintiff, should not be set aside, and a verdict entered for the defendant.

Douglas and *Milles* now shewed cause, and contended, that as this was an action in which unliquidated damages were claimed, the defendant could not pay money into court as of course. But even if it could, this was too late, it being after plea pleaded, 1 *Wils.* 157. *Barnes*, 279. And that irregularity is not cured by the plaintiff's agent taking the money out of court; for the plaintiff cannot

be

be in a better ſituation by thoſe means, than he would have been, if the defendant's attorney had paid the money into his hands. And even in that caſe, unleſs there had been a plea *puis darrein continuance*, the plaintiff muſt have obtained a verdict: for nothing can be taken advantage of under the general iſſue, but that which happens before plea pleaded. *Sullivan verſus Montague, Dougl.* 101. *Reynolds verſus Beerling, Dougl.* 108. n. 47. Beſide the agent's taking the money out of court, ought not to conclude the plaintiff, after his attorney had expreſsly given notice to the defendant's attorney, that he would not take the money.

The counſel in ſupport of the rule were ſtopped by the Court.

ASHURST, J.—This payment of money was originally irregular; for this is not one of thoſe actions in which money could, ſtrictly ſpeaking, be paid into court; but that irregularity was waived by the plaintiff's taking it out of court.

He ſhould have applied to diſcharge the rule as irregularly obtained; but inſtead of that, he received the money, which was paid into court, and went down to trial. It is no objection that the agent in town took the money out of court, becauſe he acted as the plaintiff's attorney in town, and therefore the plaintiff is concluded by his acts.

BULLER, J.—Where the defendant is entitled to pay money into court, it is a matter of courſe before plea pleaded; and now, even after plea, it is perpetually done by obtaining a judge's order for that purpoſe. No inconvenience enſues to either party from this prac-

 tice;

tice; becauſe if any expence has been incurred, that is ordered to be paid at the time of obtaining the rule. And this tends to the furtherance of juſtice; for if the defendant pays into court what is really due, the plaintiff ought in juſtice to take it. That is the caſe in general. It is true, indeed, that the defendant in this action could not in ſtrictneſs pay money into court, becauſe it is founded in damages: but if the plaintiff had intended to object to it, he ſhould have applied to diſcharge the rule. But he has acquieſced under this order by taking the money, and therefore is eſtopped from ſaying that the defendant could not pay money into court. It has been ſaid, that this is to be conſidered in the ſame light as if the defendant had, after plea pleaded, actually paid ſo much money to the plaintiff as a ſatisfaction, in which caſe, unleſs there had been a plea *puis darrein continuance*, the plaintiff would have been entitled to a verdict. But this is extremely different from that caſe; for there the payment would be the act of the party, but this payment under a rule obtained, is the act of the Court, and therefore could not be pleaded *puis darrein continuance*. Then as to the agent's taking the money out of court, it is the ſame as if it had been done by the plaintiff himſelf. For where there is an agent in town, all notices are given to him, and are not ſent into the country.

Grose, J.—Here the objection, if good, is waived; for the plaintiff is eſtopped, by taking the money out of court, from taking advantage of any irregularity. There was time enough for the agent to have written into the country after he had taken the money out of

court;

court; and after that, the plaintiff ought not to have proceeded to trial.

The *Court* made the rule abſolute, directing that the plaintiff ſhould have coſts to the time of the money being paid into court, and that he ſhould pay the defendant the ſubſequent coſts (a).

(a) Durnf. and Eaſt, 1 V. 629.

IX. Of other Matters respecting new Trials, &c.

(5.) *Of granting a new Trial after two concurrent Verdicts.*

Vide ante V. *Tyndal* and others, *versus Brown*, & VI. *Clerk versus Udall.*

Salk. 649. M. 2 An. B. R. 6 Mod. 22.
Improper to grant a new trial after second verdict on same side.

PER *Holt*, Ch. J. After second verdict on the same side, it is not fit to grant a new trial, because the Judge did not like the verdict; but if there were any practice in obtaining it, it is otherwise.

Goodwin v. Gibbons, T. 7 G. 3. B. R. 4 Burr. 2108.
Motion for new trial after two verdicts for plaintiff.

After two verdicts for the plaintiff, the defendant moved for another new trial. It was an action of trespass: and the trials had been in *Chester*.

The defendant was an attorney. At the first trial, the Jury found that He had acted beyond his office and authority, or his duty as an attorney; and gave a verdict for the plaintiff: which verdict was set aside, and a new trial granted. The second verdict was also found for the plaintiff: which second verdict was now prayed to be set aside also; and a third new trial was prayed. A rule was made upon the plaintiff, to shew cause.

Upon shewing cause, Mr. *Morton*'s report was read; and the question was much litigated: but it is not necessary to specify the particulars; because only the general doctrine

laid

laid down is meant to be here taken notice of.

Lord MANSFIELD.—There is no ground to say that a new trial shall not be granted, after a former new trial has been once granted before.

The general doctrine in such a case.

There is an index to a Report-book *, which mistakes a decisive *particular reason* in a particular case, for a GENERAL *rule*. See Modern Cases, Index, under the word "TRIAL."

But there is no such general rule as has been supposed. A new trial must depend upon answering the ends of justice.

* I suppose his lordship meant 6th Modern, where the index says—"After a trial "at bar, a new "trial denied." Sed. qu.

However, in the present case, he said, he did not see any reason for a new trial. He observed that here is no question of right, nor any great value: and upon the whole, he was clear that no new trial ought to be granted.

Mr. *Justice* YATES was clear, that a second new trial might be granted, as well as a first, *if* the reasons for granting it were sufficient.

But he also thought that in the present case there was *no* sufficient reason for granting one.

Mr. *Justice* ASTON.—The case of *Gwinne versus Poole et al'*, in 2 *Lutw.* 935, which cites *Olliet* and *Bessey*'s case in Sir *T. Jones*, 214, does not contradict the position—

"That an attorney may exceed his autho-"rity and jurisdiction; and if he acts so with "his knowledge, may be guilty as a trespasser."

And the case of *Moravia versus Sloper et al'*, in *C. B. Comyns* 574, recognizes the doctrine, "that in justifying under the process of an in-"ferior court, it is necessary to shew it to be "within the jurisdiction."

Upon the whole circumstances of this case, he concurred, that no new trial ought to be granted.

Mr.

Mr. *Juſtice* HEWITT.—If an attorney knows that the caſe is out of the juriſdiction of the inferior court, I think he will be anſwerable: eſpecially, if he knows it clearly. Here, he did know it. And beſides this, the Jury have found that He even *went beyond and out* of his duty as an attorney.

The granting a new trial a ſecond time, muſt depend upon the circumſtances of the caſe: it is very difficult to lay down any certain rule. Indeed, if two or three juries have determined upon the ſame point, and the ſame circumſtances, it may be a matter of diſcretion, not to grant a new trial, but to leave the matter at reſt.

Upon the circumſtances of the preſent caſe, no new trial ought to be granted.

Per Cur' unanimouſly—

The RULE to ſhew cauſe why there ſhould not be a new trial, was DISCHARGED.

IX. Of other Matters respecting new Trials, &c.

(6.) *Of granting new Trials in Ejectment.*

Vide note VIII. *Wright ex demiss' Clymer versus Littler & al. et post* IX. (16) *Goodtitle versus Bailey.*

IN *ejectment* after a trial at bar, Serjeant *Wright* moved for a new trial, because the verdict was *contrary to evidence:* the Court thought so too. *Rokeby* was for it, on the case in *Style*, *cæteri contra*; for *per Holt*, Ch. J. the reason of granting new trials upon verdicts against evidence at the assizes is, because they are subordinate trials appointed by *West.* 2, *c.* 30. *Ubi de paucis articulis & facilis est examinatio.* And there have been new trials anciently, as appears from this: that it is a good challenge to the juror, that he hath been a juror before in the same cause; but we must not make ourselves absolute judges of law and fact too; and there never was a new trial after a trial at bar in ejectment, but in case of ill practice, for the plaintiff may bring a new ejectment: upon this a new trial at bar was denied in Sir *Richard Temple*'s case, where the Jury found a point of law on the statute of bankrupts against the opinion of the Court.

Argent v. Sir Marmaduke Parell, H. 11 W. 3. B. R. 2 Salk. 648.
New trial after trial at bar, refused in ejectment, because not conclusive. Sed. vide post, Smith and Parkhurst.

In

Baker, on the demise of Brown, versus Petcher. M. 8 G. 2. Barnes, 440.
Verdict for defendant upon a counterfeited deed, set aside.

In ejectment. Upon the trial a verdict passed for defendant, but a new trial was granted, the mortgage deed under which defendant claimed, appearing to be a counterfeit by the stamp, the dye which impressed it not being made 'till several years after the date of the deed. Where matter of title is the dispute, and defendant obtains a verdict, a new trial is always denied; but this is an extraordinary case where the revenue is concerned.

Brooker, on demise of Mence v. Baldwyn T. 28 Geo. 2. Barnes. 468.
Verdict good in part, bad in part, in ejectment.

In ejectment. Upon motion for a new trial, Mr. Baron *Adams*, before whom the cause was tried, reported to the Court, that the verdict (which was a general verdict for the plaintiff) was good in part and bad in part, agreeable to evidence as to lands in possession of one of defendant's tenants; contrary to evidence as to lands in possession of another tenant. 12 *Mod.* 271. 2 *Salk.* 648, 3 *Salk.* 362, were quoted to shew that where a verdict is good in part it must stand. Rule, that plaintiff shall take possession of that part of the premisses only as to which the Judge reported in favour of the verdict. *Martyn* for defendant, *Poole* for plaintiff.

Vide N° IV. Huddlestone versus Brigstock and others.

Leighton v. Sir Edward Leighton. M. 1729. 1 P. Will. 671. Ca. 192. 2 Eq. Ca. Ab. 525. Pl. 4.
In case of a trust estate devised to be sold, or devised to J. S. if the will

The defendant, Sir *Edward Leighton*'s father, mortgaged, and afterwards sold the manor of *Balsley*, in the county of *Montgomery* in *Wales*, to his brother the plaintiff, and upon his death the now Sir *Edward Leighton* set up an old intail created about two hundred years since, and got into possession. The plaintiff brought an ejectment, which was tried in *Wales*, and a verdict

verdict passed for the defendant upon producing an old inquisition finding the intail; but there was no deed produced creating this intail.

be disputed, after two trials in favour of the will, equity will grant a perpetual injunction.

The plaintiff at law brought his bill in this Court, setting forth that the writings were all in the defendant's hands, and praying that they might be produced, and that the defendant might not set up a title under any trust-term. Upon which Lord *Cowper* decreed, that the trial should be upon the *mere right* in an ejectment; and that no trust-term, mortgage, or lease, should be set up, but that the defendant should make title only under the intail.

Accordingly it was tried in *Shropshire*, where, before Mr. Baron *Price*, the now defendant Sir *Edward Leighton* had a verdict; but the Judge certifying against it, a new trial was granted to be at the bar of the *Exchequer*, which was had, and a verdict for the plaintiff: there was afterwards a trial likewise in the *King's Bench*, and a verdict again for the plaintiff. And now on the equity reserved, it was prayed that the plaintiff should have a perpetual injunction with costs.

Lord *Parker*.—The plaintiff has no reason to complain (as he does) of the inconvenience, that there is no end of trials in ejectment, for the two first were found against him; but it is true, the two trials at bar, which were by the direction of the Court, being for him, I do not see what this Court has been doing, unless it should now grant a perpetual injunction. If a trust-estate be devised to be sold, and on a bill brought against the trustees to sell, the heir contests the will; after two trials, the Court will grant a perpetual injunction. In the case

(a) Preced. in Chancery, 261.

So after several trials in ejectment, and verdicts in all, in favour of the will, equity on a bill of peace will grant a perpetual injunction.

of the Earl of (a) Bath *versus* Sherwin, the title was a mere legal one; where, after several ejectments and five verdicts for the Earl of *Bath*, he brought a bill of peace for a perpetual injunction. Lord Chancellor *Cowper* thought this too much for him to grant, but seemed to recommend it to the plaintiff as a cause proper for the House of Lords; and on an appeal, the Lords granted a perpetual injunction, which I take as a reversal of Lord *Cowper*'s decree, and as a precedent in the highest court of what ought to be in this case. Consequently it is very improperly said, that only the House of Lords in such case should grant a perpetual injunction; for that house on appeal gives such a judgment as the Court below ought to have done. This Court, in directing trials, and ordering writings to be produced, has been doing nothing all this while; if it cannot grant a perpetual injunction, which really, after so many trials, seems to be for the benefit of both parties.

Equity will the rather grant a perpetual injunction where it directs the trial, or where the cause against which the verdicts are found is odious in its nature.

As to the objection, that in the case of the Lord *Bath versus Sherwin*, the Lords would not have granted a perpetual injunction, but from its being an odious cause, tending to bastardize a noble person after his death; I answer, it did not tend to bastardize the Duke of *Albermarle*, but to make him the legitimate son of Radford.

However, the principal case is such as not in its nature to be entitled to any favour; for the defendant Sir *Edward Leighton* is contending against a purchase, under which there has been possession for very many years; against a sale made by his own father to his brother; and is setting up an old intail of about two hundred years standing to defeat this purchase; and

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if there was not the cleareſt proof imaginable of ſuch an intail, (as poſſibly there was not) the Jury were in the right not to find it. It is certainly an inconvenience in the law, that there ſhould be no end of trials in ejectment; and that one trial in a real action (which perhaps may be a trial by *niſi prius*) ſhould be final, when at the ſame time twenty trials in ejectment and at the bar in *Weſtminſter Hall* will not be concluſive; but this cannot properly be urged in the preſent caſe, when upon the two or three firſt ejectments the verdicts went againſt the now plaintiff, who, had they been concluſive, muſt have been barred.

But as to the coſts in this Court, the plaintiff *William Leighton* has had relief by producing the writings, and preventing the defendant from ſetting up any old terms; and it does not appear that the defendant Sir *Edward Leighton* (the heir of an ancient family) has ſo far miſbehaved, as that he ought to pay coſts; though he ſhall loſe his own coſts, the right appearing againſt him; but the plaintiff to have the coſts at law for all the trials.

This decree was affirmed (a) in the Houſe of Lords with £. 40 coſts. (a) March 1720.

Upon a trial at bar in *ejectment*, the parties agreed to a ſpecial verdict as to a point of law ariſing upon a family ſettlement. But there being a queſtion of fact in which they did not agree, that was left to the Jury, who found it for the plaintiff againſt the weight of the evidence.

Smith ex demiſs' Dormer v. Parkhurſt et al. Hil. Term. 12 G. 2. B. R. 2 Stra. 1105.

New trials may be had in ejectment, and after a trial at bar.

The defendant moved for a new trial, and three objections were made. 1. That it was after a trial at bar. 2. That it was in the caſe of a ſpecial verdict. And, 3. That it was in

ejectment.

ejectment. These points were solemnly argued at the bar, and the Court took time to consider of them.

And as to the first, the Court held, that in the case of a verdict against evidence, its being a trial at bar was no objection to a new trial, which had been granted in the case of *Bewdley*, and in the case of Sir *Christopher Musgrave* v. *Nevinson*. *Pas.* 10 *Geo.* 1. 1 *Stra.* 584.

As to the second objection, they gave no opinion, it not being necessary to determine it upon the rule they intended to pronounce in this case.

As to the third objection, they strongly inclined, that the verdict not being final in ejectment, a new trial ought not to be granted, but upon very particular circumstances, where justice is no otherwise to be attained. And they observed, that no case had been cited of a new trial in ejectment after a trial at bar.

Sir T. J. 124. Carth. 507. et ante Argent v. Sir M. Darell.

But the point upon which the new trial in this case was denied was, because they said the evidence was doubtful, and in such a case a verdict at bar ought to stand.

Goodtitle, on the demise of Alexander and others, versus Clayton and others. E. 8 G. 3. B.R. 4 Burr. 2224.

Contradictory evidence in ejectment, but judge not dissatisfied with the verdict, as there was evidence on both sides.

Sir *Fletcher Norton*, on behalf of the plaintiff, shewed cause against granting a new trial, in an *ejectment*-cause, wherein a special jury had given a verdict for the plaintiff, the heir at law of the testator; and the defendants had moved to set it aside.

The QUESTION was on the execution of a will. The testator's name was *Weston*.

Mr. Justice *Willes* read the report of Mr. Baron *Smythe* who tried the cause; which was very particular and circumstantial; importing, in general, that the evidence was contradictory; but

but that he could not declare himſelf to be diſſatisfied with the verdict, as there was evidence on both ſides.

Lord MANSFIELD thought it a very ſtrong caſe for a new trial. He ſaid, its being an *ejectment*-caſe is no reaſon at all againſt granting a new trial: for, though a new ejectment may be brought, yet here will be a change of poſſeſſion; by which the defendant will be a ſufferer. This objection againſt granting a new trial, "becauſe a new ejectment may be brought," has been over-ruled again and again. An atteſting witneſs to a will has here come to ſwear againſt her own atteſtation. Upon the whole of the evidence reported, it is a clear caſe for re-conſideration.

Mr. *Juſtice* YATES—New trials are often granted in ejectment-caſes as well as in others; where the party praying a new trial would ſuffer by a change of poſſeſſion.

In the preſent caſe, I think, the witneſſes ought not to have been admitted to give evidence againſt their own atteſtation.

There are caſes where *one* witneſs has ſupported a will, by ſwearing that the other two atteſted, though thoſe other two have denied it.

Mr. *Juſtice* ASTON was of the ſame opinion.—Every one of theſe witneſſes has acknowledged their having atteſted this will. I think clearly that it requires a re-conſideration.

Mr. *Juſtice* WILLES concurred; and thought the weight of the evidence appeared to be on the ſide of the defendants.

Lord MANSFIELD.—I have ſeveral caſes, both upon bonds and wills, where the atteſtation of witneſſes has been ſupported by the

evidence of the other witneſſes, againſt that of the atteſting witneſſes who denied their own atteſtation.

It is of terrible conſequence, that witneſſes to wills ſhould be tampered with, to deny their own atteſtation.

Therefore—Let the rule be made abſolute, for ſetting aſide this verdict; and a new trial be had: but it muſt be upon payment of coſts.

Rule accordingly.

IX. Of other Matters respecting new Trials, &c.

(7.) *Of the Misconduct of Witnesses.*

Vide ante III. The *Queen v.* the Bailiffs and Burgesses of *Bewdley*.

IN order to a new trial an affidavit was read, that one of the witnesses had declared that he had got a guinea to stifle the truth. *Gould*— An affidavit of him who had the guinea were something, but his saying is nothing. A witness's laying a wager in the cause, is no hindrance to his being a witness, for the other has an interest in his evidence, which he cannot deprive him of.

George v. Pevice, T. 1 Ann. B. R. 7 Mod. 31.

I cannot find this case elsewhere reported, nor any other case upon the subject.

I should not have made a separate head of this one case, if I could, with propriety, have inserted it under any other.—Upon the whole, I thought it better thus to insert it, than omit the case.

IX. Of other Matters respecting new Trials, &c.

(8.) *New Trial not granted for want of Evidence which might have been originally produced.*

Vide ante IV. *Letgoe* v. *Dun*, *Wheeler* v. *Pitt*.

Anonymous. M. 8 W. 3. C. B. 1 Salk. 645. S. C. 1 Salk. 273. 2 Salk. 222. New trial for the absence of counsel or evidence. Q. Vide 6 Mod. 22. 222. 242. Faresl. 156. Vide post.

A NEW trial was granted because the counsel were absent, not thinking the cause would come on, and no defence was made; but a like motion was denied in *B. R. per Holt*, C. J. Also in one *Coppin*'s case, a cause came on at seven in the morning, and an old witness could not rise to be there time enough; but it was denied, unless he would make affidavit of what he knew, and would answer so that the Court might judge of it, and how it was material.

Pitts, al. Wits v. Polehampton, Mich. 10 Will. 3. B. R. Salk. 647. New trial for omission of the party refused.

It was moved for a new trial, because the defendant having pleaded a composition, had forgot to carry down witnesses to prove the subscribers hands; and the motion was denied, because the debt was honest. And *Holt*, C. J. remembered where debt on a bond was brought against an heir, who pleaded *riens per discent*, but the verdict went against him, by omitting to bring the settlement to the trial; and the Court

Court being moved, refused to grant a new trial, because it was an honest debt.

An inquiry found four voluntary escapes, for which *Ford*, warden of the Fleet, forfeited his office: issues hereupon were tried in B. R. at the bar. Ford v. Tilly, Pasch. 5 Ann. B.R. Salk. 653. S.C. Farresl. 156, 157. New trial not granted for defect of preparation. See 6 Mod. 22, 222, 242. Vide ante.

One escape was proved by a witness, who was asked if he was never burnt in the hand for stealing a tankard; he answered, No. A new trial was moved for upon producing the record of the conviction, and the Court denied the motion, 1st, Because it was a trial at bar. 2dly, It is no reason for a new trial, that you, for the defendant, came not prepared; and the Chief Justice said *Soam*'s case was a hard case. *Vide* 3. *Keb.* 365, 369. 2 *Lev.* 114. *et Pasch.* 4 *Ann. B. R.* between *Cockcroft* and *Smith*. That the party's evidence was not ready, was held no reason for a new trial, though at *nisi prius*: and a new trial was denied. 2 Salk. 648.

Per Cur', a new trial ought not to be granted for want of evidence, which the party might have had at the trial, and had not; but if it be proved that endeavours have been used, but prevented by some unforeseen accident, as sickness of the witness, &c. it may be good cause of new trial. Warren v. Fuzz. Mic. T. 2 Annæ B. R. 6 Mod. 22. Cause of a new trial for want of evidence.

Per Cur', a new trial is never granted for want of evidence whereof the party was apprised, and which he might have had at the trial. M. 3 Annæ, in B. R. 6 Mod. 222. New trial not granted for want of evidence, of which the party was apprised and might have had

At *Guildhall coram Raymond, C. J.*

Price v. Brown, Hil. 12 Geo. 1 Stra. 691. Evidence.

Upon payment after the day, and before bringing the action, it was pleaded to be a payment of the principal and all intereſt then due: on evidence it appeared a groſs ſum was paid, which upon computation did not amount to the full intereſt, but it was ſworn that the plaintiff accepted it in full. I objected that they ought to prove it as they had pleaded; but the Chief Juſtice thought it well enough, upon which there was a verdict. And the next term I moved on affidavits of the falſity of the defence, and that we did not expect any defence, and therefore were not ready to contradict the ſingle witneſs, who ſwore to the payment of the money. But the Court would grant no new trial, ſaying it would be of dangerous conſequence, to ſuffer people to be ſetting up new evidence, after they knew what was ſworn before.

No new trial where party might have had evidence on firſt trial.

Richards v. Symes, June 26, 1742. 2 Atk. 319.

Of granting a new trial upon a ſuggeſtion that the party was not appriſed of a particular evidence, and therefore not prepared to give an anſwer.

The queſtion was, Whether there are grounds enough for a new trial?

The fact to be tried in the cauſe was, Whether Mr. *George Richards* gave the mortgage in queſtion to the defendant in equity.

Upon the trial, in order to diſcredit the evidence of one *Bere*, the moſt material witneſs for the defendant in equity, the plaintiff brought a perſon to ſwear, that this witneſs for the defendant was not in *England* at the time he ſwore to the fact.

Several affidavits were read, upon the motion, on behalf of the defendant in equity, to prove that *Bere* was actually in *England*, at the time he ſwore to the fact.

It

It was insisted therefore, by his counsel, that the credit of *Bere* being invalidated, as hath been mentioned, weighed greatly with the Jury, and was the principal reason that induced them to give the verdict for the plaintiff in equity.

It was insisted likewise, that the defendant in equity was not prepared to do any more than to support the general character of his witnesses, or otherwise could have given the same answer he is able to do now, if he had been aware of the objection.

LORD CHANCELLOR.—This is an application for a new trial, which comes before the Court after a considerable length of time, as the verdict was given in *November* last.

The ground for the new trial is, that the defendant in this Court was surprised with evidence he was not aware of, and so he was not prepared to answer it.

A great many objections have been made to this motion, both upon general and particular reasons.

The first objection, That this is an application for a new trial, after a verdict found by a special Jury upon a trial at bar.

I do agree, that formerly some countenance has been shewn to this objection, a distinction taken between trials at bar, and at *nisi prius*, because the latter are subordinate to the other, and therefore not of so solemn a nature.

A distinction was taken formerly, between trials at bar, and at nisi prius; but in the case of the Queen and the Bailiffs and Burgesses of Bewdley, eleven Judges against one determined a new trial ought to be granted.

Vide ante III.

But this point was solemnly considered upon the case of the *Queen* and *the* Bailiffs and Burgesses of *Bewdley*, 1 *P. Will.* 207, where eleven judges against the single opinion of Mr. Justice *John Powell*, determined that a new trial ought to be granted.

Another general objection was, that it is

 contrary

contrary to the rules in courts of common law.

For it was ſaid, they never grant a new trial there for want of the attendance of witneſſes, or of a party's not being ready.

The reaſon is plain, becauſe the iſſue there is barely drawn out upon the fact which is to be tried, and it is impoſſible to tell, whether a jury found a verdict upon the merits, or upon a diſcrediting of witneſſes; and courts at common law might ſet aſide a verdict nine times in ten, if it ſhould be a ground for a new trial, that one of the parties was not appriſed of the evidence on the other ſide.

The intent of directing iſſues here, is only to inform the conſcience of the Court, and therefore not tied down to the ſame ſtrictneſs of verdicts as courts of common law.

But then it is ſaid, and materially too, that there is a difference between iſſues at common law, and iſſues directed by this Court, becauſe the intent of it here is only to inform the conſcience of the Court, and therefore not tied down to the ſame ſtrictneſs and regard for verdicts as courts of common law.

A notice to the defendant before the trial, that the plaintiff will prove a perſon to be abroad, though it does not point out the particular place where, is ſufficient for the defendant to be prepared to encounter this evidence.

But in the preſent caſe, there are no grounds for a new trial, the perſon who makes an affidavit on behalf of the defendant in equity ſwears, that he gave *Richards* notice a fortnight before the trial, that they would on the other ſide attempt to prove *Bere* abroad, which though it was not ſo particular as to point out the very place where they would ſhew him to be, yet was ſufficient notice for *Richards* to prepare to encounter this evidence.

Vide poſt, Eſſay IV.

The caſe of the *Attorney-General verſus Montgomery* has been mentioned, in which I granted a new trial, but upon very different reaſons from the preſent.

I was then aware of the inconvenience which might ariſe from granting new trials, upon

upon the discovery of new evidence relating to the same fact: but what I placed the chief weight upon was, that the evidence there was in the hands of the relators themselves, and there was no kind of danger of perjury, and therefore can be no precedent in the present case.

There is another reason that weighs with me, that the new trial is prayed on behalf of the plaintiff at law, and if it had been better made out, I should not have inclined to grant it, because it was in his power to have been nonsuited; for if his counsel had been of opinion that there was evidence that they were not apprised of, and too strong for them to encounter, they might have advised him to suffer a nonsuit, and then he might have come back to this Court for new directions, who would have ordered another issue at law notwithstanding the nonsuit.

If there is evidence a plaintiff is not apprised of, he may suffer a nonsuit, and on his coming back to this Court, I would have ordered another issue at law, notwithstanding the nonsuit.

Upon the whole, there are no grounds for a new trial, and of extreme dangerous consequence, to grant it merely upon a suggestion, that the party was not apprised of this evidence, and therefore was not prepared to give an answer.

A motion was made for a new trial: the question was as to the forgery of a certain paper, relative to the estate of Captain *Girlington*.

Stace v. Mabbot. July 26, 1754. 2 Vezey 552. Trial.

Against it, it was said, Justice *Foster*, who tried the issues, had certified, that he was satisfied with the verdict; and two cases were cited: the first, an action of *trover* brought among several other things for an ewer, wherein evidence was given, that those particular goods were delivered to one, who took them into

New trial upon new evidence, where the conscience of the Court was not satisfied, although the Judge certified in favour of the verdict, and where it would

not be granted in a court of law, which is ftricter, and will not grant it to introduce new, or anfwers to, evidence.

into his cuftody, was anfwerable for, and did not deliver them. A motion was made for a new trial; for that looking into Mr. Deard's books it was found, there were two ewers: whereas upon the material evidence, on which the converfion was found, it was one ewer only: but that was denied, for the Court faid, the parties might have introduced this evidence before. The other, *Walker* v. *Scot*, *B. R. Hil.* 1749-50; which was an action for criminal converfation, and a motion for a new trial on evidence, that the plaintiff was married to another, and therefore was not hufband to the woman, and could not maintain his action; and that the evidence given was infamous: but this was denied, becaufe it would be dangerous, if the Court was to permit the credit of evidence to be impeached by fubfequent evidence, which was in the party's power before: and the fact of marriage might have been gone into before,

New trials of modern introduction, and to avoid difficulties in attaint. Granted here in cafe of inheritance or of value, or where the Court was not fatisfied, particularly on forgery

Lord CHANCELLOR.—If this had been an application for a new trial in a court of common law, in the ordinary courfe of proceedings there; I believe it is not fuch a cafe, that it would be granted; for they hold thefe motions for new trials by pretty ftrict rules. They have been a modern introduction; and by the difcretion of the courts introduced, in order to avoid the difficulties of defeating verdicts by attaint, in which it was difficult to prevail. But however, on motions for new trials at law the rule is, that if a verdict is given on evidence fairly, according to proper notice, and the Judge does not report, that he is diffatisfied with it, or that it was againft evidence; the Court will not grant it, in order to introduce new evidence or new

anfwers

answers to evidence; for the parties are supposed to come prepared to support the characters of the witnesses on either side, which is always presumed, and is right for courts of law to adhere to that: otherwise it would be endless. But this Court directs issues to be tried at law to inform the conscience of the Court as to facts doubtful before; and therefore expects in return such a verdict and on such a case, as shall satisfy the conscience of the Court to found a decree upon; if therefore upon any material and weighty reason, the verdict is not such as to satisfy the Court to found a decree upon, there are several cases, in which this Court has directed a new trial for further satisfaction, notwithstanding it would not be granted, if in a court of common law; because it is *diverso intuitu*, and because the Court proceeds on different grounds.

'This is known to be the ordinary rule of this Court, where a matter of inheritance is in question; for the Court says, an inheritance is not to be bound by one verdict, if any sort of objection arises to the trial; and that notwithstanding the objection of inconvenience in examining over and over, which objection has not prevailed. This extends also to a personal demand, where of considerable value, and where the Court is not satisfied with the grounds, on which the determination was made at law, and when an objection is made and supported by proof; and particularly in a case of forgery new trials have been granted, and that by judges who have sat here, who have been as reluctant as any, and who inclined to adhere to the rules of common law. I remember a case in Lord *King*'s time relating to a rent charge, granted out of the estate of

Mr.

Mr. *Hockmore*, in *Devonshire*. It had been twice or thrice tried at common law, tried upon distress taken on the rent charge, and an avowry, and where the question was singly whether it was a forgery or not, and upon all those trials verdict was found for the deed.

A bill was, notwithstanding, brought here to set it aside for forgery; and Lord *King* sent it to trial under an issue directed by the Court: and, I believe, there was a new trial after that; and notwithstanding all those verdicts, Lord *King* made a decree to have it brought into Court and cancelled here, the former trials not being to the satisfaction of the Court. Undoubtedly therefore it is in the discretion of the Court to grant new trials, if they think fit, if there is a ground for it upon the circumstances here; and the question is, Whether there is so or not? I own, I had very great suspicion, when it was on before me upon exceptions; however I did not think fit to determine it, but sent it to a Jury. The Judge has declared, he is well satisfied with the verdict; and if nothing appeared to me, but what appeared to him thereon, I think, I should have been of the same opinion with him. My opinion, therefore, in granting a new trial is grounded upon new evidence, which was not before the Jury there, and which is material. I cannot say, that my conscience is satisfied as to the grounds and truth of the evidence, upon which this verdict is given. I proceed therefore upon the principles of this Court in directing trials, and not to break in upon the rules which are wisely laid down by courts of law, as to granting new trials; and shall therefore direct another trial upon these issues: but it must be on payment of costs.

Assumpsit

Assumpsit upon a promissory note; defendant pleaded that the plaintiff accepted of some chests of tea in satisfaction, upon which issue was joined, and there was a verdict for the defendant; it was now moved on behalf of the plaintiff by Sir John *Strange* and Mr. *Crowle* for a new trial, upon an affidavit that the plaintiff took this to be a sham plea, and that he had a letter under the defendant's own hand, wherein it appears the defendant had disposed of the tea to another person, and wherein the defendant says he will pay the plaintiff his money due upon the note; which letter the plaintiff did not produce at the trial, thinking the plea was a sham, and that the defendant could not possibly prove it.

Cooke v. Berry. T. 18 & 19 G. 2. B. R. 1 Wilson, 98.

New trial never granted for want of evidence which might have been produced at the trial.

But *per Curiam*, new trials are never granted upon the motion of a party, where it appears he might have produced and given material evidence at the trial, if it had not been his own default, because it would tend to introduce perjury, and there would never be an end of causes if once a door was opened to this.

Suppose in a *scire facias* upon a judgment the defendant has a release, he is summoned, and has an opportunity of pleading it, and does not, he shall never have an *audita querela*; this is a very strong case at bar, for the plaintiff has notice of the defence of the defendant in his plea, and ought to have come prepared to falsify it at the trial.

In a scire facias on a judgment, the defendant hath a release and omits to plead it, he shall not have an audita querela.

And *Dennison*, J—— said he remembered a case of a horse plea, where the defendant pleaded he gave the plaintiff a horse in satisfaction. Plaintiff looked upon it as a horse (or sham) plea indeed, but the defendant at the trial proved it a true plea. Rule to shew cause why there

Vide ante Ford v. Tilly. Et Warren & Fuzz. Et ca. following.

there ſhould not be a new trial was diſcharged.

Norris v. Freeman. Mic. Term. 10 Geo. 3 C. B. 3 Willſ. 38.

A new trial granted, altho' there was evidence on both ſides, becauſe all the witneſſes ſubſcribing to a releaſe, were not called and examined, &c.

Debt upon a bond; defendant pleaded a general releaſe; plaintiff replied *non eſt factum*, thereupon iſſue was joined; the cauſe was tried at the laſt aſſizes for the county of *Worceſter*, before the Lord Chief Baron *Parker*, when a verdict was found for the defendant. Serjeant *Nares* moved for a new trial, upon an affidavit that very ſtrong circumſtances of forgery and perjury appeared upon the trial, whereupon the Court made a rule to ſhew cauſe. The *Chief Baron* reported, that at the trial the defendant produced a general releaſe, ſuppoſed to be executed by the plaintiff the 10th of *October* 1768, to which *Albert* and *Goff* appeared to be ſubſcribing witneſſes. *Albert* was called, and ſwore that in *October* 1768, he was ſent for, to go to the plaintiff's houſe to be a witneſs; that he went thither, and there ſaw the plaintiff ſeal and deliver the releaſe produced in evidence, and alſo ſaw the defendant execute another general releaſe to the plaintiff, (that the other ſubſcribing witneſs was a poor labouring man, but he was not called to prove the releaſe); that this was done about one o'clock that day, at the plaintiff's houſe, which is about thirty miles diſtant from *Worceſter*. *John Webb*, a clergyman, and *Joſeph Collins*, were called for the plaintiff, who ſwore they had often ſeen the plaintiff write, and that the plaintiff's name ſubſcribed to the releaſe, was not of his hand-writing, as they believed; and that on the 10th and 11th of *October*, the plaintiff and witneſſes were at *Worceſter* all day; it was the mayor's feaſt-day. Then *Thomas Homer* was called, (for plaintiff) who

ſwore

ſwore he heard the defendant ſay, he would let judgment go by default in this cauſe, and file a bill in *Chancery* againſt the plaintiff for an account, and did not pretend he had any releaſe from the plaintiff. It alſo appeared, that the declaration in this cauſe was of *Trinity* term 1768, and that the releaſe was not pleaded until *Trinity* term laſt. In reply, the defendant called ſeveral witneſſes, who ſwore they believed the name ſubſcribed to the releaſe produced, to be the plaintiff's handwriting; upon ſumming up the evidence, the *Chief Baron* acquainted the Jury, that he thought the ſtrength of the evidence was with the plaintiff, but they found a verdict for the defendant.

Serjeant *Davy* for the defendant againſt a new trial, inſiſted, that there never was a new trial granted, ſingly, upon a Judge's reporting, that the ſtrength of the evidence was on the ſide of the plaintiff or defendant; that in this caſe, there was evidence on both ſides, of which the Jury are the only proper judges; and although it is ſworn (by the witneſſes for the plaintiff) that the plaintiff and the witneſſes to the releaſe were at *Worceſter* on the 10th and 11th of *October* 1768, yet the witneſs *Albert* did not ſwear, that the releaſe was executed on the day it bears date, it might be drawn and written on the 10th, and not executed till ſome days after; the *alibi*, only goes to falſify its being executed on the 10th; the *Chief Baron* hath not reported, that the verdict is contrary to evidence. Serjeant *Nares* was about to reply, when the Court, without hearing him, were of opinion, there ought to be a new trial.

† *Curia.*

There are cases where the Court will grant a new trial, although there was evidence given on both sides.

Curia. There are many cases where the Court will grant new trials, notwithstanding there was evidence on both sides, as where all the light hath not been *let in* at the trial which might and ought to have been; we think the other subscribing witness *Goff* ought to have been called and examined to the execution of the release, and he not having been called, we think it would be hard the plaintiff should be bound by this verdict, especially as the release is not in the power of the plaintiff, and so he cannot prefer an indictment for forgery. The *Lord Chief Justice* said, he thought the evidence was very strong on the part of the plaintiff, and that if the cause had been tried before him, he would (under the circumstances appearing) have called out for *Goff* the other subscribing witness, and if he had not been produced, he should have thought it a very strong case for the plaintiff, and directed the Jury to have found a verdict for him. A new trial was granted; *absente Gould,* Justice.

Gist v. Mason and others, 26 G. 3. B R. Durnford and East. 1. V. 84.

Where a policy does not appear on the face of it to be illegal, the Court will not grant a new trial, in order to let the defendant into proof that it was so; but he should have shewn it on the trial. How far trading with an enemy is illegal in a subject? Qu.

Case for money had and received, to recover the *premiums* upon certain policies of insurance underwritten by the plaintiff. This was tried before Lord *Mansfield*, at the sittings after last *Michaelmas* term at *Guildhall*, when the following facts appeared. That the defendants were *West India* merchants, and had property in the islands captured by the *French* last war. That it was a common practice to supply these islands with provisions from *Ireland*, notwithstanding they were in the hands of an enemy; that the defendants, who acted as their own brokers, had for this purpose employed neutral vessels, and had caused them to be under-

written

written by the plaintiff from different ports in the Continent to *Ireland*, thence to *Madeira* and St. *Thomas*; and to all of them was annexed *the liberty of going to any of the captured islands*.

It had been long doubted whether these policies were legal: but in the case of the *Bella Juditha* (a), whereon a similar policy was effected, the Court were of opinion that the assured could not recover.

(a) Dalmady v. Motteux. Mich. 25 G. 3. N. B. In that case the court decided principally upon the ground of an embargo having been laid on provisions in Ireland.

The plaintiff, in consequence of the above decision, had refused to pay where there had been a loss.

The defendant's counsel at the trial contended, that as these *voyages* were illegal, and as both the parties were in *pari delicto*, the maxim of law *melior est conditio possidentis* ought to prevail: but Lord *Mansfield*, being of opinion, that these policies were not illegal on the face of them, directed a verdict for the plaintiff.

Bearcroft now moved for a new trial to let the defendants into evidence to prove, that this kind of trading was so notoriously illegal, that the plaintiff must have known it to be so; that the reason why this evidence was not offered at the trial, was founded on a presumption that the Jury of their own knowledge must have concluded, that the illegality of these contracts was known to the parties at the time of making them.

Lord MANSFIELD, *C. J.*—This, upon the face of it, is the case of a neutral vessel. It is no where laid down that policies on neutral property, though bound to an enemy's port, are void. And indeed I know no cases that prohibit even a subject trading with the enemy, except two; one of which is a short note in *Roll. Abr.* (b), where trading with *Scotland*, then

(b) 2 Roll. Abr. 173.

then in a general ſtate of enmity with this kingdom, was held to be illegal; and the other was a note (which is now burned) which was given me by Lord *Hardwicke*, of a reference in King *William*'s time to all the Judges, whether it was a crime at the common law to carry corn to the enemy in time of war; who were of opinion that it was a miſdemeanor.

By the maritime law, trading with an enemy, is cauſe of confiſcation in a ſubject, provided he is taken in the act; but this does not extend to a neutral veſſel.

Ashhurst, *J.*—The defendant makes this application to the Court in order to ſupply his own negligence, when it is evident he was not taken by ſurpriſe at the trial. If it does not appear on the face of the policy that it is void, it ought to have been ſhewn by evidence; but no ſuch evidence was offered.

Buller, *J.*—As to the illegality of the contract being within the knowledge of both parties, ſuch a fact is not to be taken for granted: what paſſes between two parties can never be ſuch a matter of notoriety as ſhould be left to a jury to preſume.

Rule refuſed.

IX.

IX. Of other Matters respecting new Trials, &c.

(9.) *Verdict wrong delivered by the Foreman amended.*

ON a motion (made the 18th instant) to *set aside a verdict*, as being given in by the *foreman*, CONTRARY to the opinion and intention of EIGHT *of the Jury*—It appeared that the defendant justified under a right of a way, over the plaintiff's ground, to *two* closes of the defendant's, *viz. Broadmoor* and *Three-Acres:* upon which, *two different issues* were joined; *viz.* one upon the right of a way to *Broadmoor*; the other, upon the right of a way to the *Three-Acres*. And, the foreman gave in the verdict as a *general* verdict for the defendant, upon *both* issues. But *eight* of the Jury made *affidavit* "That it was the MEANING and INTENTION of the WHOLE *Jury* to "find the former issue for the defendant; and "the LATTER for the PLAINTIFF: and that "this mistake was discovered by them, *an hour afterwards*; but not till the JUDGE "WAS GONE to his lodgings." And upon the Judge's report it appeared that, though there was indeed evidence on *both* sides, yet the *weight* of the evidence was (as it appeared to him) on the side of the plaintiff, as to this latter issue.

Cogan v. Ebden, and another. T. 30 and 31 Geo. 2. 1 Burr. 383.
Thursday 23d June 1757.
Verdict delivered by the foreman, contrary to the opinion and intention of eight of the Jury.
Eight of the Jury made affidavit that it was the intention of the whole of the Jury to find otherwise than the verdict delivered.

N. B.

N. B. The foreman had declined making any affidavit; because, he said, he should make himself appear a fool, to the Court of King's Bench.

This matter was much litigated by the counsel on both sides. The counsel for the plaintiff mentioned the case of *Baker v. Miles*, in *C. B. in M.* 4 *Geo.* 2. *B. R. S. P.* where eleven of the jurymen swore "That "the foreman had mistaken their verdict;" and it was thereupon set aside.

The Court were all clear that this was a *mistake*, arising from the Jury's being unacquainted with business of this nature; and from the Associate's omission in not asking the Jury particularly "how they found *each re-"spective* issue," and in not making the Jury fully *understand* their own finding; and that it was agreeable to right and justice, that the *mistake should be* RECTIFIED.

And they had no doubt about the *fact* of this mistake; from the affidavit of the eight jurymen, *confirmed* (as they held it in effect to be) by the foreman's declining to make any affidavit at all; especially, as the Judge's notes shewed the weight of the *evidence* to have been for the plaintiff, as to this latter issue.

And Lord MANSFIELD and Mr. Justice DENISON thought that as it was a *mere slip*, there might be *some* method of RECTIFYING *the verdict* according to the truth of the case; from the Judge's notes, if they were sufficiently particular; WITHOUT *sending* the issue to be tried over again, at a great expence.

Vide post IX. (3.)

And the case of *Newcombe v. Green*, in 2 *Strange* 1197, was mentioned; where the *postea was* amended by the Judge's notes. And Lord *Mansfield* said, that at least they could

set

ſet aſide the verdict *without* coſts. But difficulties occurring how the coſts would be, in ſuch a caſe; as *one* iſſue was ſtill found for, and was in truth clearly for the defendant. Therefore *Cur advis'*.

And now Lord MANSFIELD, ſeeing Mr. *Morton* in Court, who was concerned for the plaintiff, and had (on his behalf) moved to SET ASIDE the verdict, took occaſion to mention this caſe; and ſaid they had thought of it, and he had talked with his brother *Wilmot* * too, about it: but however, he was not now going to give any opinion; but only to *propoſe* what ſeemed to him the moſt proper method of coming at it.

* [Whoſe ordinary engagements were now in the other court.]

The caſe of *Newcombe v. Green*, itſelf, is not applicable to this caſe: but there is another caſe, of *Mayo v. Archer*, in 1 *Strange* 514, 515, where the queſtion was, "Whether "a farmer who bought and ſold potatoes "could be a bankrupt:" and the ſpecial verdict did not ſet forth the *quantities* he had bought and ſold; though they were *proved at the trial*. The Court did not there award a *Venire facias de novo*; but *amended* the ſpecial verdict, in that reſpect; which caſe is more applicable to the preſent caſe, than that which was cited: for here they ordered the ſpecial verdict to be amended: though the plaintiff's motion was only "that a *Venire facias de novo* "might be awarded."

But another caſe has been mentioned to me, which is applicable to the *principle* of this caſe; though not like the particular fact. It is that of *Dayrell v. Bridge*, *Tr.* 22 *G.* 2. *B. R.* treſpaſs for cutting down an oak-tree—the defendant pleaded ſeveral pleas; one of which was, "*Not guilty*." At the trial, a *ge-*

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neral verdict was taken down, and ſo entered; and the Court *rectified the verdict*, by expunging the finding on all but the "Not guilty:"

It appearing that nothing was in queſtion (at the trial) but "whether the place where "the tree ſtood, was parcel of the manor, or "not." In the caſe of *Newcomb v. Green*, ſeveral caſes * were cited on the ſame ſubject: though the caſe *itſelf* is not the preſent caſe.

If the Court ſets the matter right, they ſhould proceed according to the *whole* truth of the caſe. The Judge who tried the cauſe agrees to the fact diſcloſed in the affidavit of the *eight* jurymen: whereas your *firſt* affidavit, on which the rule was made, was an affidavit of only *four* of them.

Therefore what I would propoſe is, that you ſhould make your motion, and have a rule to ſhew cauſe, why, upon reading the affidavits of theſe *eight* jurymen, the verdict ſhould not be AMENDED *and* SET RIGHT, *according to the truth of the finding*.

Note.—Such a motion was afterwards made; and a rule to "ſhew cauſe" granted. But it never came before the Court any more: it plainly appearing that the Court, upon deliberation among themſelves, had come to an opinion "that in this ſhape the verdict *might* "be ſet right."

* None are mentioned by Strange, pa 1197. But Cro. Car. 238. Eliot v. Skypp. 1 Salk. 53. Bold's caſe, and a caſe of Fry v. Horder, in Ld. Raymond's time, were cited.

IX.

IX. Of other Matters respecting new Trials, &c.

(10.) *Of amending the Postea.*

A Writ of error was brought to reverse a judgment given in the Common Pleas in an action of trespass, and the error assigned was, that in the postea there is no association to the justice of assize expressed, as ought to be. *Roll Chief Justice* answered, this is the fault of the clerk of the Assize: *therefore let him attend and shew cause why the postea shall not be amended.*

Poynes v. Francis, H. 1649. Banc.Sup. M. 24 Car. rot. 222. Sty. 191. Error to reverse a judgment in trespass —No associate to the Judge. Amendment.

This cause was tried at *nisi prius* before the Lord Chief Justice, and a verdict taken by mistake of the associate generally for the plaintiff against both defendants, instead of finding the defendant *Edward Jones* not guilty; as to the other defendant, verdict was found for the plaintiff, damages £. 200. Plaintiff moved that the return of the *postea*, as to *Jones*, might be amended, which was ordered on the Chief Justice's report, and hearing counsel on both sides. The return of the *postea* is the act of the Chief Justice, and must be made as it ought to be: it was urged by defendant's counsel, that the verdict as to the other defendant, was contrary to evidence; but be that so or not, the verdict being right in part,

Williams against Jones and another, E. 8 Geo. 2. Barnes 6. A verdict taken generally by mistake against two defendants, when one of them should have been acquitted.

Vide post IX. (14.) cannot be set aside. *Darnall* and *Wright* for defendants; *Eyre* for plaintiff.

Hankey, Knight, who as well, &c. against Smith. H. 15 Geo. 2. Barnes 449. To amend the postea, by returning the verdict on the third instead of the first count.

Rule to shew cause why the *postea* should not be amended, by returning the verdict on the *third* instead of the *first* count, according to the finding of the Jury, was made absolute, upon the report of Mr. Baron *Carter*, before whom the cause was tried. It was ordered, that the associate do amend the *postea* in Court; that defendant have four days after the amendment to move in arrest of judgment; and that plaintiff do pay defendant costs of this application. *Prime* for plaintiff; *Bootle* for defendant.

Newcombe v. Green. M. 17 G. 2. 2 Stra. 1197. Postea amended by the judge's notes.

In covenant the breach was assigned in non-payment of £. 270 mortgage-money. And on the trial the Jury gave a verdict for £. 274. 11*s*. damages; and Mr. Justice *Burnet* entered it so in his minutes, but the clerk of *nisi prius* had only marked 1*s*. damages on the *distringas*.

The Court was now moved, to alter the indorsement, by making it agreeable to the Judge's notes. And Mr. Justice *Denison* having conferred with him, and reporting the matter to be as above stated, the Court ordered it to be amended accordingly.

Vide Auger and *Wilkins*, *post* IX. (19.)

Fellowes and another against Hopkins and another, executors of Harris. E. 20th G. 3. B R. Doug. 361. Where there is a general ver-

Assumpsit tried before Lord *Mansfield*, at *Guildhall*, at the sittings after last *Michaelmas* term. The declaration contained several counts; some upon promises made by the testator, others on other promises by the defendants themselves. To the first set of counts

plene

plenè administravit was pleaded, and the general issue to the others; and the Jury having found for the plaintiffs with £.147 damages, a *general* verdict was entered by the officer.

dict on a declaration consisting of different counts, some of which are inconsistent or bad in point of law, and evidence has only been given on the good or consistent counts, the verdict may be amended by the judge's notes.

At the trial, the only question was, Whether the plaintiffs were entitled to interest on the value of goods sold by them to the testator? They were wholesale linen drapers, and the testator an *American* merchant, and it appeared to have been the usage of the *American* trade, for merchants here to allow their *American* correspondents twelve months credit, and then to charge them five *per cent.* for interest, and for the tradesmen here, to allow the merchants fourteen months credit, and then to charge five *per cent.* This was hardly disputed by the defendants, and his Lordship held, that though, by the common law, book debts do not of course carry interest, it may be payable in consequence of the usage of particular branches of trade; or of a special agreement; or, in cases of long delay under vexatious and oppressive circumstances, if a jury in their discretion shall think fit to allow it. But none of the articles for which the testator was indebted to the plaintiffs had been delivered *fourteen months before his death*, so that no interest was owing when he died, and the defendants contended that the usage did not bind the executors. Lord *Mansfield*, however, and the Jury, thought otherwise.

In the last term, the *Solicitor-General* obtained a rule to shew cause why the judgment should not be arrested, on the ground that the verdict was general, and the counts inconsistent, and such as require different judgments to be entered, *viz.* judgment *de bonis testatoris* on those where the promises were laid to be by

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the testator, and *de bonis propriis* on the others. — Some time afterwards, *Baldwin*, for the plaintiffs, obtained a cross rule for the defendants to shew cause why the *postea* should not be amended by the judge's minutes, and a verdict entered for the plaintiffs, only on the counts to which the evidence given at the trial applied, and for the defendants on the others.—Both these rules came on to be argued this day.

The *Solicitor-General*, for the defendants, insisted, that, if the Court were to alter the *postea*, they would, in fact, do what was properly and exclusively the province of the Jury, for that the verdict would then be the act of the Court.

Lee, for the plaintiffs, contended, that this was not a new sort of application, and cited a case of *Newcombe* v. *Green*, in *Strange*, where it appeared by the judge's minutes that the jury had found for the plaintiff with £. 274. 11 *s.* damages, but the officer only entered a verdict with 1 *s.* damages, and the court directed an amendment to be made according to the judge's minutes (a.)

V. ante.

Lord MANSFIELD * said it was impossible to believe there was such an absurdity in the law, as that a mere mistake of the officer should be without a remedy, and that neither the judge nor jury could possibly have proceeded on what there was no evidence of before them: and he mentioned a case of one *Gibson*, who had been tried for robbing Mr. *Francis*, and convicted, and a mistake being discovered in the verdict, upon consultation with all the judges at his chambers, it was corrected from minutes signed by the jury, and the prisoner executed.

(a) Vide Mayo v. Archer. B. R. E. 8 Geo. 1. 1 Str. 513, 515, where a venire de novo was moved for, on an affidavit that certain facts which the court thought material, but which were not found, in the special verdict, were proved at the trial; but the court directed the verdict to be amended in that respect.

* Vide also Bois v. Bois. B. R. T. 16 Car. 2. 1 Lev. 134.

BULLER,

BULLER, *Justice*, said there was this distinction, that if there was only evidence at the trial upon such of the counts as were good and consistent, a general verdict might be altered from the notes of the judge, and entered only on those counts, but that if there was *any* evidence which applied to the other bad or inconsistent counts (as for instance in an action for words, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and a general verdict) there the *postea* could not be amended, because it would be impossible for the judge to say, on which of the counts the jury had found the damages, or how they had apportioned them: that, in such a case, the only remedy is by awarding a VENIRE DE NOVO (b.)

He mentioned an instance where Sir *Fletcher Norton* had moved for and obtained a *Venire de novo* in a case of that sort (c.)

The rule to arrest the judgment was discharged, and the other rule made absolute; but on the payment of costs, including those of the motion, in arrest of judgment.

(b) Vide Auger v. Wilkins. Post IX. (19.) Where this was done, and said to be according to an ancient rule of court.

(c) Grant v. Astle. T. 21. G. 3. Vide IX. (19.)

IX. Of other Matters respecting new Trials, &c.

(11.) *Not granted in penal Actions, where the Verdict is for the Defendant.*

Seymour, Bart. qui tam v. Day. 2 Stra. 899.
No new trial in a qui tam, after verdict pro def.
This on the game law.

ACTION for a penalty in killing an hare, not being qualified.

The Jury found for the defendant, contrary to the direction of the Judge: but the Court refused a new trial, saying it had never been carried so far as a penal action.

Fitch who as well, &c. against Nunn, M. 27 G. 2. Barnes, 466.
Verdict for defendant against evidence, on the game law—new trial refused. Vide ante IX. (4.) Same cause.

This was an action brought on one of the penal statutes made to preserve the game, wherein defendant obtained a verdict; plaintiff moved for a new trial, and the Judge before whom the cause was tried, reported the verdict to be contrary to evidence. Notwithstanding which, the rule to shew cause why a new trial should not be had, on payment of costs, was discharged; because no instance could be shewn wherein an action on a penal statute, in which a verdict was found for defendant, a new trial had ever been granted. *Willes* and *Agar* for plaintiff; *Wynne* for defendant.

Mattison qui tam v. Allanson M. 19 G. 2. 2 Stra. 1238.

An action was brought upon the late statute against horse-racing for the penalty; and the Jury found a verdict for the defendant,

 contrary

contrary to plain evidence; and the Court denied a new trial, there being no proof of any miſbehaviour in the defendant, or tampering with the Jury. And this was within the reaſon of caſes in the Exchequer where verdicts for defendants are never ſet aſide for penalties in the caſe of duties; and this is excepted out of the ſtatute of Jeofails, as much as indictments.

New trial where not grantable.
Verdict for defendant againſt evidence, on the ſtatute againſt horſe racing, refuſed to be ſet aſide
1 Raym 6,.
2 Keb 226.
V. poſt.

Qui tam upon the game act for killing a hare, verdict for defendant; motion for a new trial, becauſe the Judge who tried the cauſe refuſed to admit a perſon to be a witneſs, who was a pariſhioner of the ſame pariſh where the hare was killed; but *C. J. Lee* ſaid, he did not remember that ever a new trial had been granted in the caſe of a penal action; and ſo *per Cur'*, the motion was refuſed.

Jervois qui tam v. Hall. E. 16 Geo. 2. B. R. 1 Wils. 17.
No new trial in a penal action, videlicet, on the game act.

In an action upon the ſtatute againſt bribery, there was a verdict for the defendant; and now Serjeant *Forſter* moved for a new trial, as being againſt evidence. But *per totam Curiam*, we never grant new trials in actions on penal laws; and it has been ſo held for more than fifty years paſt.

The Court condemned the caſe in 2 *Keb.* 226.

Fonereau v. ——— E. 10 Geo 3.
C B. 3 Wils. 59.
A new trial is never granted in actions upon penal laws, where verdict for defendant. This on the ſtatute againſt bribery.

IX. Of other Matters respecting new Trials, &c.

(12.) *Of new Trials in criminal Prosecutions.*

(a.) *In the nature* of Civil *Proceedings.*
(b.) *In actual* Criminal *Prosecutions.*

(a.) *In the nature* of Civil *Proceedings.*

Vide XII. The *King v. Roger Philips,* Mayor of *Caermarthen.*

Rex v. Lord Fitzwater. T. 27 Car. 2. B.R. 2 Lev. 139. If Jeofails in informations, &c. are cured by verdict, or not. This an information in the nature of a quo warranto for fishing in the river Thames.

INFORMATION in the nature of a *quo warranto* for fishing in the river *Thames,* in a place extending to B. in seven parishes, as appears upon the record. After verdict for the defendant, it was moved in arrest of judgment by *Maynard,* that the *venire* was taken of one parish only, where it ought to have been of all, and that it was not cured by the statute of *Jeofails,* being an information which is excepted out of the statute. 1 *Cro. Rex* v. *Talbot,* and also in the new statute 16, 17 *Car.* 2. is the same exception of all *appeals, indictments, informations, and informations upon penal statutes.* To this it was answered that this is the fault of the prosecutor himself who sued out the *Venire facias, ergo* he ought not to take advantage of his own default. And the *proviso* excepts informations, &c. upon

 penal

penal laws only, which is not the caſe here. And as to the opinion in *Talbot*'s caſe, they ſaid, it ſeemed unreaſonable, to hold that the king was not bound by the law, not being named, for it appears by the exception that the parliament underſtood that the king was bound though not named, otherwiſe there had not been any occaſion for the exception. And if he had been bound, if the exception had not been in thoſe caſes, he ſhould be bound in this caſe which is not excepted. *Twiſden* and *Wild* held this caſe not cured by the ſtatute. *Hale ſemb contra & adjournatur.* And afterwards in *Michaelmas* term the verdict was ſet aſide upon *affidavits*, that the Jury caſt lots for their verdict, and gave it according to lot; ſo the exception here was not determined. The Jury caſt lots for their verdict. This a ground to ſet it aſide.

The queſtion was, if upon a trial, a point in law be ſtarted by the judge, and the counſel do not take it up, but inſiſt upon other facts, which are found againſt them; whereas had the counſel inſiſted upon the matter of law ſtarted by the Judge, the verdict muſt have paſſed for them, whether this is ſufficient cauſe to move for a new trial? Queen and Corporation of Helſton in Coun'Cornwall. H. 12 Ann. B.R. Lucas, or 10 Mod. 202. Motion for a new trial, a point of law ſtarted by the Judge, which the counſel did not take up.

Chief Juſtice PARKER.—The granting of new trials is of late original; it began about the year 1652, when the firſt new trial was granted for exceſſive damages. Experience ſhews, that they are grantable, as well for a fault in the judge, as jury, in cauſes tried at *niſi prius*, becauſe a judge of *niſi prius* acts rather in a miniſterial than judicial capacity; and the ground and foundation of granting new trials, when either the judge or jury are to blame is one and the ſame, *viz.* doing juſtice to the party. When granting new trials began. Vide poſt, and qu. de hoc? When grantable. Salk. 649.

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The queſtion in this caſe, I take to be this: Whether we are ſo bound down by forms of law, as that though we ſee a verdict given contrary to. a point of law (which the Judge himſelf took notice of, and yet for want of the counſel's doing their duty to their client, was not inſiſted upon) we cannot grant a new trial?

When a point of law ariſes, whether the counſel inſiſt, or not inſiſt upon it, the judge is bound to direct the jury accordingly.

But yet, if the ſupporting of this verdict, be of no more ill conſequence, than in point of coſts, and the party has another remedy left him, then I am of opinion, that the party ought to ſuffer for the neglect of his counſel.

But if the verdict binds and concludes the right of the party, then I think it hard, that the party ſhould loſe his right, by a miſtake, or ſlip of the counſel.

Powys *ſenior.*—It would be a vaſt inconvenience, if the bare ſtirring of a point at *niſi prius*, and which for ought appears, neither judge, counſel, nor jury thought upon more, ſhould be a ground for granting a new trial; for it may be, the reaſon why it was not inſiſted upon by the counſel was, becauſe they knew the other ſide had evidence, that would give it a full anſwer, by quite altering the fact. What happens now accidentally, may hereafter happen deſignedly; matter may be ſlided in by the counſel, and then dropt, only in order to move for a new trial; and it is better to ſuffer a particular inconvenience, than open the way to a general miſchief.

Miſtake of a judge or jury a good cauſe for granting a new trial, but not the miſtake of counſel.

Eyre.—Miſtake of judge or jury, a good cauſe of granting a new trial; but never yet heard, that the miſtake of the counſel was ſo. The counſel ſtands in the place of his client; and

and therefore if the counsel waive a point, it is the same as if the client did it himself.

POWYS *Junior*.—If a defendant in an action of debt upon a bond who has a good defence upon the merits, should, by advice of counsel, hazard his cause upon a demurrer, which is adjudged against him, this mistake of counsel would not be allowed in Chancery, as a good cause of relief*.

In debt upon bond, if the defendant, who has a good defence upon the merits, should hazard his cause upon a demurrer, he can have no relief afterwards.

PARKER, *Chief Justice*.—There must be no new trial. And I so far assent to my brothers, that though a verdict should leave the party remediless, yet if the counsel does not only, not insist, but expressly waive an objection, *&c*. that then there ought to be no new trial.

Upon the trial of an information in the nature of a *quo warranto* for exercising the office of Mayor of *Shaftesbury*, the Jury found a verdict for the defendant; and upon a motion for a new trial, great doubts arose, whether after a verdict for the defendant, there could be any new trial, though the Judge should certify (as he did in this case) that it was a verdict against evidence.

The King v. Bennet. T. 4 Geo. 1. B. R. 1 Stra. 101.

Court divided about a new trial, in an information in nature of a quo warranto, for exercising the office of Mayor of Shaftesbury.

After the point had been twice spoken to *in B. R.* it was adjourned *propter difficultatem* to be argued before all the Judges of *England*, who being this term assembled at *Serjeant*'s-*Inn*, the following arguments were made.

DENTON.—New trials can only be granted by the superior courts, and not by any inferior ones. Trials at the assizes are subordinate

* At common law, in such cases, the courts frequently give leave to withdraw a demurrer, even after argument, and to plead, upon payment of costs.

trials, and under the inſpection of the ſuperior court out of which the record iſſues. In *Stiles* 466. which was the firſt * new trial that ever was granted, it was ſaid by *Glynne*, that the court in theſe caſes has a judicial, but not an arbitrary diſcretion. I muſt agree that generally no new trial ſhall be granted after a trial at bar, but yet in the *ſcire facias* againſt *Bewdley*, *Trin.* 11 *Annæ*, which was brought to the bar, and the Jury refuſed to find a ſpecial verdict, the Court ordered a new trial.

* V. ante VI. Wood & Gunſton, & Qu. If this was the firſt?

1 Will. Rep. 2[illegible]. Vide ante III.

It is objected, that this is a criminal proceeding. But we ſay, that ſince 9 *Annæ*, c. 20, it has a mixture of civil. The relator is liable to coſts, and the ſtatutes of Jeofailes extend to it. And why ſhou'd not this be conſidered in the ſame view as *Mandamus*'s, upon which new trials are granted frequently. The original writ of *quo warranto*, was merely civil. *Old. N. B.* 107. *Sid.* 54. 86. 2 *Inſt.* 282. *Raſtal*, 540. *Old Ent.* 133, 134. and upon that the franchiſe, which was a civil right, might be ſeiſed. Formerly, indeed, upon an information in the nature of a *quo warranto*, the party could only be puniſhed for the uſurpation. *Yel.* 190. *Cro. Jac.* 260. 1 *Bulſt.* 54. *Co. Ent.* from 527 to 564. But now judgment of *ouſter* may be pronounced.

Theſe rights are of a high nature, and it would be a great inconvenience, to tie them up ſtricter than actions. Suppoſe the Jury ſhould refuſe to find a ſpecial verdict, or the Judge ſhould miſtake the law, will there not be a failure of juſtice, if a new trial cannot be had? *Mich.* 2 *Geo. Rex* v. *Inhabitantes de Walthamſtow*, in an indictment for not repairing the highway, and *Regina* v. *Inhabitantes*

de

de com' Wilts, for ſuffering *Lacock Bridge* to be in decay, new trials were granted.

Pengelly, Serjeant.—This is a diſcretionary queſtion, wherein no defect of power is to be ſuppoſed. The defendant cannot plead Not Guilty. 2 *Inſt*. 282. 2 *Co*. 24. *b*. 28. b. *Hardr*. 423. *Cro. Jac*. 43.; but muſt diſclaim, or ſhew his right.

It is the prerogative of the Crown, to determine civil rights by way of information. Thus the King brings his information of intruſion in the *Exchequer*, which is but a common ejectment. And ſo informations by way of *devenerunt*, which is in effect an action of trover; and in theſe caſes new trials are every day granted. *Co. Ent*. 390. And in thoſe caſes there is a fine.

It will be no objection that the year is expired; for this proſecution was commenced within the year, and the judgment muſt be the ſame, becauſe it is to avoid all meſne acts. *Co. Ent*. 527, 530. *Trin*. 8 *Ann. Regina* v. *Barber*. That was an information of this nature againſt the defendant, who claimed to be burgeſs of *Thetford*. There was judgment by default, and then came a pardon, which was held only to diſcharge the fine, but not the judgment of *ouſter*. The fine here will be *ſalvo contenemento* according to *Magna Charta*, and the bill of rights. Since the ſtatute this has all the incidents of a civil proſecution, the commencement only excepted. Before, the King only could have it, but now any private perſon may at peril of coſts. If no new trial be granted, the Crown will be in a worſe condition than the ſubject: for here the verdict will be final, and no new information can be had.

Earl, Serjeant, *contra*.—The only queſtion is, Whether this be a criminal or a civil pro-

 ſecution?

ſecution? For, on the one hand, if it be of a civil nature, I muſt agree a new trial may be granted: and on the other hand, it muſt be admitted, that if this be merely criminal no new trial can be had.

It is not denied, but that at common law this information was a criminal proceeding; whether the ſtatute has altered the nature of it, is the doubt. We think it remains as it did before. The conſequence of it is ſtill fine and impriſonment, with this addition, that judgment of *ouſter* may be given, which could not before; and becauſe the ſtatute has made it more penal than it was at common law, therefore, ſay they, it is now changed from a criminal to a civil nature. This is ſuch an inference, as I cannot ſee into the reaſon of. But, ſay they, the ſtatutes of Jeofails do not extend to criminal proceedings, but they extend to this; *ergo*, this is not a criminal proceeding. I deſire to know, whether it will be pretended, that they would have extended to this caſe without the expreſs proviſion of the ſtatute? Certainly they would not. And the Parliament was aware of that, and therefore added that clauſe. The firſt * new trial is *Stiles* 448. and there the witneſs died of an apoplexy. Lord *Townſend v. Dr. Hughes in C. B.* 2 *Mod.* 150 †. In *ſcandalum magnatum* a new trial was denied.

* Qu.? Vide ante VI. Wood & Gunſton, Sty. 466.

† Vide ante VI.

Cannot the King releaſe, pardon, or ſtop this proſecution? Surely he may. In capital caſes the defendant may plead *autre foits acquit*; ſo careful is our law, that the ſubject ſhall never be borne down by the weight of the Crown. 1 *Sid.* 405. 2 *Keb.* 403, 765. 1 *Lev.* 9. 1 *Keb.* 124. are caſes where the defendant was convicted, and in *favorem libertatis* a new trial

may

may be granted. *Mich.* 3 *W.* & *M.* *Rex* *v.* *Davis*, in an information for a riot, a new trial was denied. 1 Show. 336.

Mich. 7. *W.* 3. *Smith* v. *Frampton*, *Salk.* 644. in an action for negligently keeping his fire, wherein the defendant was acquitted, it was refused to be tried again. Indeed *Pas.* 4 *Jac.* 2. *Rex v. Simpson et al'*, information for seditious words, after acquittal a new trial was granted, but whoever observes the time that case happened, and that it was denied for law by *Holt* in *Davis*'s case before cited, will think it of little weight. *Pas.* 2 *W.* & *M.* *Dr. Salmon*'s case, the defendant was convicted of perjury, and had a new trial; but the Court said it would have been otherwise if he had been acquitted. *Pas.* 5 *Ann.* *Regina v. Clarke*, in an indictment for a nusance, after acquittal the Court denied a new trial, 'till the defendant came in and consented. It was granted in Sir *Jacob Banks*'s case, only because he had carried it down by proviso, which could not be against the Crown. Vide ante IV. 2 Salk. 651.

Mich. 3 *Ann.* *Hartness v.* Sir *J.* *Barrington*, after the defendant had been acquitted of an assault, a new trial was denied. So *Salk.* 646. after acquittal for a libel.

In this case the office is determined, so there can only be a fine and imprisonment. And if one new trial may be had, the same reason will hold for a second and a third, and nobody can say where it will stop. It may happen that the defendant may be convicted on a second trial, for want of that evidence which acquitted him before. The case of *Bewdley* was only a *scire facias*, which is a proceeding purely civil.

Yorke.—This queſtion is of far greater conſequence to the ſubject than the Crown. It conſiſts of two parts:

1. Whether a new trial can be granted in any of thoſe caſes?

2. Whether there be any particular circumſtances in this caſe, to diſtinguiſh it from the general ones, and ſo induce the Court to refuſe it?

First, When new trials firſt came in, they introduced a great alteration. The caſe of *Fenwick* v. *Holt* (which was an information, and not an indictment, as ſome of the books ſay) is full in point; and the Court ſaid they could not do it without altering the law; which ſhews there is not a diſcretionary power. This is the rule in criminal caſes, which I ſhall ſhew this to be. At common law, uſurpations were a crime, a contempt to the King, and an oppreſſion of the ſubject. A *quo warranto agit in rem*, an information in nature of a *quo warranto in perſonam*. The firſt charges a crime, and the other a *uſer* of the franchiſe. This is all of the Crown ſide, which the civil rights of the Crown are not, as *quare impedits*, which are of the plea ſide. The replication concludes, *petit quod convincatur*; and ſo is *Co. Ent. tit. quo warranto*; now *conviction* implies *crime*. This cannot be called an action, the proſecutor neither demands nor recovers any thing, *et actio nil aliud eſt quam jus proſequendi in judicio quod ſibi debetur.*

Vide poſt IX. (12) (b.)

When proceedings in *Eyre* dropt, then informations came in, which are of a higher nature than the proceedings in *Eyre*. 2 *Inſt.* 282, 498.

The ſtatute 9 *Ann.* takes notice of this as a criminal proceeding: as for the coſts, they are collateral,

collateral, and cannot change the nature of it. The 4 & 5 *W.* & *M. c.* 18. gives costs in perjury, where prosecuted as a misdemeanor by information; and can any one say it is now become a civil prosecution? In the case of *Strode* v. *Palmer*, it was held, that *mandamus*'s would not come within the description of *actions*, so as error might lie in the Exchequer-Chamber. Litt. Ent 248.

The Jury may take the law upon them, if they will. *Litt.* §. 368. The relator here is only appointed for the security of the costs. In the case of *Ilchester* he died, and thereupon the defendant moved to stay the proceedings: No, says the Court, this is the cause of the Crown.

I omit his argument from the facts in this case.

Denton replied, The clause of jeofails was only thrown in, *in majorem cautelam*, as declaratory of the law.

Pengelly.—Sir *T. Jones*, 163, new trial after conviction of perjury.

Afterwards in *B. R.* PRATT, *Ch. J.* declared, that they had called in the assistance of the other Judges, and that upon the whole they were equally divided; so no rule for a new trial could be made. The division, as I was informed, was thus: For a new trial, in B. R. *Pratt* and *Eyre*; in C. B. *King* and *Tracey*; in *Scacc. Price* and *Montagu.* Against a new trial, in B. R. *Powys* and *Fortescue*; in C. B. *Blencowe* and *Dormer*; in *Scacc. Bury* and *Page. Vide post Essay* III. the *King* and *Francis.*

Upon an information of seisure of Jesuits bark on the stat. 14 *Car.* 2. *cap.* 11. *sect.* 12. for Robinson qui tam v. Lequesne, Trin. Term

1728, Bunbury 251. Whether a new trial can be granted on an information of seisure, where a verdict is for the defendant.

for fraudulent exportation of Jesuits bark, two casks out of six being dust. There was a verdict for the defendant, and now a motion was made for a new trial; but, *per totam Curiam*, it was denied.

Nota, It seemed to be admitted in a case of this nature a new trial might be granted, if the fact would have admitted of it, and the counsel for the plaintiff were prepared with precedents (if they had been called for) to that purpose.

Nota, Nothing is forfeited on this clause of the act, but the goods themselves.

The King v. Bell, M. 8 G. 2 2 Stra. 995. No new trial to be granted after four years acquiescence. This a quo warranto against a person acting as a common council-man of Marlborough.

An information in nature of a *quo warranto* was brought against the defendant, to shew by what authority he claimed to be a common-council-man of *Marlborough* and upon a trial in 1731, there was a verdict for the defendant.

This term the prosecutor moved for a new trial, as being a verdict against evidence; and the prosecutor referred to the report of the Judge, and insisted he was not too late, there being no judgment yet signed, according to the case of *Gilman* v. *Smith*, *Mich.* 9 *Geo.* 1. where it was held, that though the four day rule be out, yet it is sufficient if they come before judgment. 2 *Stra.* 845.

But the Court would not suffer the merits of the motion to be gone into, on account of the length of time since the verdict; it being possible that many men's rights might depend on the validity of this man's vote, which the corporation was bound to admit, after a verdict establishing his right. And it would be much less mischief, to let this verdict stand (supposing it to be wrong) than introduce a general inconvenience. They said, all new trials

were

were discretionary: and though my Lord *Holt* entertained a notion of their being ancienter than the case in *Stiles*, from the challenge we meet with in the old books, that the juror had before given a verdict in the same cause; yet it does not thence follow, that the court granted a new trial upon the evidence; for it might appear to be a mis-trial upon the record, or there might be other reasons to award a *venire facias de novo*.

On a motion for a new trial, on an information in the nature of a *quo warranto* against defendant, to shew cause by what authority he acted as *Mayor* of *Liverpoole*, for that the verdict was found on the matter of law, against the direction of the Judge; the Judge at last ordered the Jury to find it specially; but they brought in a general verdict.

The King v. Poole, E. 7 Geo. 2. Annaly 23. 2 Barnard, K.B. 93, 447. S. C. 2 Kel. 210. Pl. 164.

Quo warranto for acting as Mayor of Liverpoole.

Resolved, That the certificate of the Judge reporting the matter of fact, as appearing before him, at the trial, is conclusive, nor can any affidavit be received against it, for that would be to try the matter again upon affidavit.—Stands over.

N. B. It has been a doubt, which divided the twelve Judges in the case of the town of *Shaftesbury*, whether a new trial may be granted on an information in the nature of a *quo warranto*, after a verdict found for the defendant, as this suit partakes both of a civil and criminal nature; but it never was doubted, but that a new trial might be granted after a verdict for the King.

The King v. Bennet, vide ante. See And. 68, Hil. 4 G. 1.

In the case of *the Queen* and *the Mayor and Burgesses of Bewdley*, it was determined by the opinion of eleven Judges against Mr. Justice *Powell*, that if the jury find a verdict upon a point

Trin. 11 Ann. Wil. Rep. 221.

point of law, contrary to the direction of the Court, or find a general verdict where they are directed to find the matter specially, a new trial may be granted even after a trial at bar. The principal cause came on again, 8 *Geo.* 2, 1734. Mr. Justice *Fortescue*, who tried the cause, certified that the verdict was found against his direction, and that he was dissatisfied with it. There were four issues, the three first were preparatory to the last, and were excuses for the late Mayor's adjournment of the Court to a day after the day appointed by the charter, and the Jury found that there was no necessity for such adjournment, with which verdict the Judge reported himself satisfied. The last issue was, whether or no the defendant was duly elected Mayor, and the Jury found him not duly elected; and this was the verdict with which the Judge was dissatisfied. The point of law was, Whether the late Mayor had a power to adjourn the election of a new Mayor to a day beyond the charter-day?

Trin. 8 Geo. 2. 1734.

Serjeant *Eyre*, Mr. *Bootle*, Mr. *Strange*, and others for the prosecutors: that though it is the general rule to grant a new trial on a Jury's finding the matter of law against the direction of the Judge, yet if it should appear to the Court above, that the Judge had mistaken the law, in his direction, and that therefore the Jury had found right, the Court would not grant a new trial, since the Jury could at length find no otherwise; and it would put the parties to the expence of a new trial to no purpose, for should they again be directed in the same manner as before, and find accordingly, the Court would grant a new trial for the mis-direction of the Judge.

† And

And that it would appear in this case, by the record before the Court, that the Judge had mistaken the law, and that though his report is conclusive as to matter of fact, the Court having no other way to be satisfied of it, yet it is not so as to the matter of law, as that may be gathered in many cases from the record.

That this may be compared to the case of an immaterial verdict for the defendant, wherein it appears that he has made out no title by his plea, or confessed the action, judgment will be given for the plaintiff, as in the case of the *King* and *Phillips* of *Godmin*, *Stra.* 394, where on an information in the nature of a *quo warranto*, there was a verdict for the defendant, and yet judgment for the prosecutors, because the plea had not traversed the usurpation. 9 *H.* 6. 37. *pl.* 12. It is stated, that if in debt, the defendant pleads such matters as shew that in point of law he owes the debt, and yet concludes that he owes nothing, the plaintiff may nevertheless claim judgment upon the confession; and that though there should be a verdict for the defendant, yet judgment will be given for the plaintiff. 2 *Rol. Abr.* 99. *pl.* 1. *Lacy* and *Reynolds*; and another in the same book, in an action on the case for words, after a verdict for the defendant judgment for the plaintiff on the confession. 1 *Salk.* 173, *Jones* and *Bodnam*, and in the same place *Staple* and *Heydon*, *Yelv.* 169, *Mullineux*'s case. *Broome* and *Woodward*, *Trin.* 4 *Geo.* 2. Trespass for entering plaintiff's house, and taking away his goods; the defendant justified for a distress for rent, and that the goods were appraised, and the appraisers sworn before the headborough, and the

Judgment, confession.

Defendant now by virtue of the stat. 11 Geo. 2. c. 19. § 21. may plead the general issue, and give the special matter in evidence.

the residue of the money returned. Upon this issue joined; verdict for the defendant, but judgment for plaintiff, because it appeared by the act of parliament, that the appraisers should be sworn before the sheriff or constable, whereas it was alledged in the plea that they were sworn before the headborough.

Easter, 4 *Ann.* A case in Serjeant *Salk.* manuscript notes; trespass for throwing down and carrying away stalls; as to all the trespass, but throwing down, the defendant pleaded Not Guilty; as to throwing down a special justification, in which the defendant admitted both the throwing down and carrying away the stalls. The Judge of *nisi prius* refused to try the cause, because the action was confessed; and afterwards on motion in the Court above it was held, that the Judge did right.

The following exceptions were taken to the opinion of the Judge:

First, That it appears upon the face of the record, that the defendant *Poole* was not elected Mayor agreeable to the charter, for the charter appoints the 18th of *October* for the day of election, whereas the defendant has set forth in his plea that he was chosen on the 19th, and that the act 11 *Geo. c.* 4, does not give a power to Mayors to adjourn the election at their own will, without any reason, to a day when their power is expired; neither does it give any authority even on an adjournment, to proceed upon a poll taken the first day, but they must begin *de novo*.* That it appears upon the record that the late Mayor, whose power determined the day before, presided at the election, when the defendant was

chosen;

chosen; whereas the act requires, that the next officer should preside, the Mayor's power being determined. That the statute directs the election to be begun between the hours of ten in the morning and two in the afternoon, whereas it appears by the defendant's plea, that this election began betweeen eight and nine in the morning; that it appears that the defendant was elected the 19th of *October*, and yet he pleads an election for the year next ensuing, whereas by the charter his office expires the 18th of *October* next, which is within the year; on all which accounts it appears that this cannot be a lawful election, and therefore no new trial should be granted.

But *per* HARDWICKE, *Ch. Just.* A new trial ought to be granted in this case.

In the first place, that the general rule is, that if the judge of *nisi prius* directs the jury on the point of law, and they think fit obstinately to find a verdict contrary to his direction, that is sufficient ground for granting a new trial: and when the judge upon a doubt of law, directs the jury to bring in the matter specially, and they find a general verdict, that also is a sufficient foundation for a new trial.

But to those general rules there are some limitations as clear as the rules themselves; one is, that if the judge should direct the jury plainly and certainly wrong in point of law, and the jury should find contrary to his opinion, and it should appear to the superior court, under whose direction all trials at *nisi prius* are, (Salk. 643.) that the judge was undoubtedly mistaken; the court would not grant a new trial, because it would be putting the parties to trouble to no purpose; and if the next judge should direct the jury in like manner,

manner, and they find accordingly, there muſt be a new trial for miſ-direction.

Another limitation is, that if it appear upon the record, before the court, that it is impoſſible that the defendant ſhould have judgment, by reaſon of his bad plea, though the verdict were found for him; the court would not grant a new trial. But then theſe things muſt appear very clearly, and it muſt be, where every thing appears upon the record, that can poſſibly ariſe upon the trial, for if all the matter does not ſo appear, and the verdict may poſſibly prejudice the defendant in point of law, the court ought, in juſtice, to grant a new trial.

That in the preſent caſe it does not appear ſufficiently upon the record, that the law is againſt the defendant, nor that his plea is ſo bad, that he could not have a judgment were the verdict found for him.

There are two points, one upon the common law, and the other upon the ſtatute; and had the preſent caſe reſted wholly on the common law, it ſeems that no new trial ought to have been granted; for the law, before the 11 *Geo. c.* 4. was taken to be, that the mayor's office determined at the end of the year, and therefore it ſeems that it would have been a void election, where the adjournment was made to a day after the expiration of his office, eſpecially where it is done without cauſe.

But the 11 *Geo. c.* 4. was made to remedy ſuch inconveniences; and on that act it ought to be tried again.

It ſeems, indeed it ought to have been the original intent of that act, to enable corporations to go to an intire new election on a ſubſequent

ſequent day, where no election had been begun before; but notwithſtanding, as this is a remedial law, to prevent inconveniences ariſing from new elections of annual officers on the charter-day, if the words of the act are large, and general enough, to comprehend the continuing of elections begun on the charter-day, but not completed within that time, as the miſchief is the ſame, the court ought to give a liberal conſtruction to them; the act ſays, that where, by any accident or default whatever, no election ſhall be made on the charter-day, they may proceed to an election on another day, *&c.* Upon this, ſuppoſing the Mayor had done wrong in making a voluntary adjournment, the wrong acts of officers were part of what was intended to be provided againſt by this act.

Another objection is, that the adjournment was made between the hours of eight and nine, inſtead of ten and twelve: but this mention of hours in the ſtatute, is certainly directory, and not reſtrictive; and intended to prevent ſurpriſe, by beginning at inconvenient times; now as to what appears on this record, there is no pretence of ſurpriſe in the preſent caſe.

Roll's *Abr*. The caſe of *Lanſdown*, that corporation choſe their officers eight days after the charter-day, and adjudged good, for that the day was only directory.

The next objection is, that the Mayor, whoſe office had expired the day before, preſided at this election, and did that appear on the face of the record, it would be a ſtrong objection in favour of the proſecutor; but it does not, therefore the whole matter not appearing upon the record, it ought to go again

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to trial, that if the jury ſhould find a ſpecial verdict, the facts might come more fully before the court.

As to the objection, that it is pleaded to be an election for the year next enſuing, this may be, as it were, a technical year created by the act of parliament, as in corporations where the charter determines the office on a day after a moveable feaſt, the officers are nevertheleſs ſaid to be choſen for a year.

The thing that governs greatly in this determination is, that the point of law is not to be determined by juries; juries have a power by law to determine matters of fact only: and it is of the greateſt conſequence to the law of *England*, and to the ſubject, that theſe powers of the judge and jury are kept diſtinct; that the judge determine the law, and the jury the fact; and if ever they come to be confounded, it will prove the confuſion and deſtruction of the law of *England*.

The verdict given in the preſent caſe may prejudice the defendant on a writ of error, ſince for any thing that can appear to a ſuperior court, the jury might have found their verdict on this, that the defendant had not the majority of votes: ſo that though the law ſhould be with him, he is yet concluded, as they might have found it upon the fact.

The Court concurring in opinion, a new trial was granted, on the common rule of payment of coſts.

The St. Ives Cauſes.

Rex v. Praed, or Rex v. Edwards. M. 9 G. 3. B. R. 4 Burr. 2257.

A criminal motion was put off, till the validity of a rate ſhould be tried in a feigned iſſue, "Whether it was an equal, or a par-

" tial one." And a verdict having passed *for the defendant*, upon such issue,

Verdict for defendant against evidence, refused to be set aside, considering the proceeding as of a criminal nature.

Mr. Solicitor-General (*Dunning*) moved, and was seconded by Sir *Fletcher Norton*, for a new trial; the verdict having been given *contrary to evidence*.

But the *Court* were clear against granting a new trial; because it was within the *same reason* as if it had been in a *criminal* prosecution. For, as this issue was directed in order to know " Whether this was an illegal and " partial rate;" and if it had been found to be partial, the consequence would have been either an attachment or an information; it was just the same thing, as if it had been a verdict found for the defendant, *upon an information*: and *if* it *had been upon an information*, the Court would not have set aside the verdict and granted a new trial, although the acquittal had been contrary to the weight of the evidence.

However, it was agreed that when the original motion should come on again, it would be open to any *other* objections, to the legality of the rate; only taking it for a fact, " that it was *not* a partial one."

The King v. Thomas Amery. Same v. John Monk. H. 27 G. 3. B. R. Durn and East. 1 V. 575.

The first of these was, an information in the nature of a *quo warranto*, calling upon the defendant *Thomas Amery*, to shew by what authority he claimed to be an alderman of the city of *Chester*.

Quo warranto against defendant acting as alderman of Chester.

Questions as to usage; acceptance of charters; corporation by pre-

The defendant, after having *pleaded* that the corporation of *Chester* was a prescriptive corporation, set forth a charter granted in the 37th year of King *Charles* the Second, by which the citizens and inhabitants of the city of *Chester* were incorporated. That the charter

ſcription; and by charter; of the ſuſpenſion of franchiſes; and various other points of law.

ter directed, that the corporation ſhould conſiſt (*inter alia*) of a mayor, recorder, twenty-four aldermen, and forty common-council-men, &c. and it appointed the firſt twenty-four aldermen by name. The defendant then averred, that the ſaid charter, as to the election of aldermen of the ſaid city, was duly accepted and agreed to by the ſaid citizens, and inhabitants. And then deduced a regular title as alderman under that charter.

Replication 1ſt. That the mayor and citizens, *at the time of making the ſaid charter*, were not, nor had from time immemorial been, a body corporate, &c. and iſſue.

2dly. That *Charles* the Second did not grant the charter mentioned in the plea; and iſſue.

3dly. That the charter 37 *Car.* 2. as to the election of aldermen, was not duly accepted by the citizens, and inhabitants; and iſſue.

4thly. That certain perſons in the ſaid charter mentioned did not become, nor were, aldermen of the ſaid city; and iſſue.

5thly. That the mayor, aldermen, and common council, have not exerciſed the franchiſe of electing aldermen according to the intent of the ſaid charter; and iſſue.

6thly. That the defendant was not at the time in the plea mentioned a citizen, and one of the common-council; and iſſue.

7thly. That the defendant was not elected an alderman by the major part of the then mayor, aldermen, and common-council, &c. and iſſue.

8thly. That the defendant was not duly admitted, &c. and iſſue.

The *ſecond Replication* ſtated, that in the 35th year of the reign of *Car.* 2. an informa-

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tion was filed, in the nature of a *quo warranto*, against the mayor, and citizens of *Chester*; that in *Hilary* term, 35 and 36 *Car.* 2. there was a judgment (by default) by the Court of *King's-Bench*, that the liberties, privileges, and franchises in the said last-mentioned information should be seised into the hands of the king, until the said Court there further ordered. That in *Trinity* term, 36 *Car.* 2. it was adjudged by the said Court, that the said liberties, *&c.* should be seised into the hands of the king, and remain in his hands, and that those liberties, *&c.* should be extinguished, and the said mayor and citizens expelled and removed therefrom; which judgment was in force at the time of making the charter of *Car.* 2.

It then alledged that there were other matters in the charter of *Car.* 2. and particularly that the king willed that the charter should be sealed, as well under the great seal of *England*, as under the seal of his county Palatine of *Chester* (a), which were not stated in the defendant's plea, and that the charter, not being accepted by the said citizens and inhabitants, as to those as well as all other matters therein contained, was void.

(a) The king died on the 6th February 1684, two days after granting this charter. Vide post.

The *third Replication* stated, that *Car.* 2. by his said charter reserved full power to himself, his heirs and successors, at his and their free will and pleasure to remove the mayor, recorder, common-clerk, or any one or more of the aldermen, common-council-men, *&c.* of the said city, by an order of privy-council to them respectively signified; and that as often as he, his heirs, and successors, by any such order made, should declare any such mayor, *&c.* to be removed from his or their respec-

tive offices, that then and from thenceforth the mayor, &c. and all or any of them, so amoved from their respective offices, should without further process, actually be amoved, &c. and that in every such case, some other fit person or persons, within a convenient time after any such amotion, should be chosen, &c. in such manner as by the letters patent was before directed, into the place and office, &c. of any person so amoved. That King *James* 2. by an order of privy-council, dated the 12th of *August*, 1688, according to that power, amoved all the corporators then in being, which was regularly signified to them; wherefore the power in the said charter, as to the election of aldermen, ceased and determined.

The *fourth Replication* stated a charter of the 21st *Hen.* 7. which was accepted, and a confirmation of it in the 16th *Eliz.* which was also accepted; that both those charters were in force at the time of the judgments in *quo warranto*; and that those judgments were in force on the 17th *October*, 1688. That King *James* 2. afterwards on the 26th *October*, 1688, granted a charter of restoration to the mayor and citizens of *Chester*, which was accepted. Wherefore the charter of the 37th *Car.* 2. after the granting and acceptance of the charter of restoration, was of no further effect.

The *fifth Replication* stated a charter of incorporation in the 21st *Hen.* 7. with a power of electing aldermen annually, by the corporation at large, which was accepted; a confirmation of it in the 16th *Eliz.* which was also accepted, and that both those charters were in force at the time when the charter 37 *Car.* 2.

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was granted: wherefore it was of no force as to the election of aldermen.

Rejoinder, That the charter of 37 *Car.* 2. was accepted by the citizens and inhabitants, as to all the matters contained therein; and 9th issue thereon. That the order in council was not signified as stated in the replication; and 10th issue thereon.

That the charter of 37 *Car.* 2. continued in full force as to the election of aldermen from the time of the granting and acceptance thereof, until the time of exhibiting the information; traversing the acceptance of the charter of *James* 2; 11th issue thereon.

That after the granting of the charters of *Hen.* 7. and *Eliz.* there were judgments of ouster against the mayor and citizens, in the 35th *Car.* 2. *&c.* traversing the charters of *Henry* 7. and *Eliz.* being in force at the time of the charter of *Car.* 2. and now; 12th issue thereon.

This cause was tried at the last assizes for *Salop*, before *Eyre*, Baron, when the Jury found a verdict for the prosecutor, on the 3d, 5th, 9th, 10th, 11th, and 12th issues; and for the defendant on the 1st, 2d, 4th, 6th, 7th, and 8th issues.

The pleadings in the other cause of the *King* against *Monk*, were similar to these, excepting that they were relative to the office of *common-council-man*. On a motion for a new trial, a very considerable body of evidence was read from the report of the learned Judge, a detail of which it is not thought necessary to enter into here; the report of this case being given only for the purpose of shewing the different points of law which arose in it.

In general it appeared that the felect body named in the charter of *Car*. 2. affumed their corporate functions, and acted under that charter for about three years, during which time about thirteen of the old freemen were admitted under the new charter. That upon the order of council of *James* 2d. the old corporation refumed their functions, and the members of the other retired The reftored corporation returned to their antient mode of proceeding in moft articles; but in fome inftances, and particularly in the election of aldermen and common-council, they had in general continued to proceed according to the method directed by the charter of *Car*. 2. excepting during four years, foon after the revolution: during which time they proceeded nearly, though not entirely, according to the charter of *Hen*. 7. They likewife continued to hold the hofpital lands, and a fair, to which it did not appear that they had any title, but under the charter of *Car*. 2. It alfo appeared, that the election of aldermen by the felect body, had been made previous to the charter of *Car*. 2. by virtue of a bye-law under the charter of *Hen*. 7.

It is alfo to be remarked, that the charter of *Charles* the Second did not appear to have the feal of the county palatine, according to the directions of the charter; and evidence was given to fhew that there was no entry in the feal-keeper's books of the county palatine, of any fees having been paid for affixing the county palatine feal (a).

(a) Ante.

The learned Judge, after ftating particularly all the evidence, concluded his report with obferving, that, in his directions to the Jury, he

he had told them that the right of election of aldermen of this corporation, in the mode contended for on the part of the defendant, ought to be supported if possible. That the usage had prevailed in *Chester* for a great number of years, and was reasonable in itself. But that on a general view of the case in evidence, he found it extremely difficult to support it under the charter of *Charles* 2d. the granting of which appeared to have been a measure of the times, and which, from the moment when it became necessary to tread back those steps in the latter end of the reign of King *James*, seemed to have been entirely laid aside. That in summing up the evidence he had assumed that there was no contrariety. That the Jury might conclude upon it, that the corporation of *Chester* was a corporation by prescription, and under charters, at the time of the judgment in *quo warranto*; in which however he stated, that he had differed from the counsel on both sides. That the franchises of the corporation were in fact suspended by that judgment. That the charter of *Charles* 2d. was acted upon for three years next after the granting of it. That after the charter of restitution was granted, the officers of the old corporation resumed their places; and that from that time they went on without appearing to advert in any one instance to the charter of *Charles* 2d. as the authority under which they were to act. For though it was true that one of the witnesses had stated in his evidence, that, as he understood it, the select body was now somewhat differently constituted from what it appeared to have been before the charter of *Charles* 2d. in repect of the two sheriffs making or not making a part of the forty common-council-

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men; and the elections of mayor and recorder, are now approved of by the King, which is conformable to the charter of *Charles* 2d. and is not required by the charter of *Hen*. 7.; that those, and a few other instances which might occur, of apparent conformity to the charter, having obtained, without any actual reference to it; and in a multitude of other instances, the usage being in direct contradiction to the charter, he had thought there was in effect no evidence that the old corporation had ever recognized that charter. As to the election of aldermen, it was clear that the usage had existed a great number of years, before the charter of *Charles* 2d.

That the operation of law upon this state of the fact, applicable to the issues in this cause, was the next thing to be considered. That he went into the discussion of that question, with a considerable degree of hesitation in his own mind. That he was not perfectly satisfied, as to the legal effects of the judgment in *quo warranto*; or of the charter of restitution; especially as opposed to the charter of *Charles* 2d. which had intervened: That he had hazarded this opinion; that the judgment in *quo warranto*, being a judgment by default, where no cause of forfeiture appeared upon the record, did not dissolve the corporation. That it only seised the franchise into the King's hands, and thereby *suspended* the exercise of the functions of the corporation. That the charter of *James* the 2d. restored the franchise to the *old* corporators; and that after that restoration, the charter of *Charles* the 2d. was to be considered in the same manner, as if it had been granted before the judgment in *quo warranto*; in which case, without an *acceptance* by the old

old corporation, it would have no effect within the diftrict wherein the old corporation had power to act. And that there was no fuch acceptance; which was fubftantially determining the iffue upon the acceptance of this charter, againft the defendant.

Seeing the cafe in that light, he had treated the iffue upon the notification of the order of amotion, as of no great confequence in the caufe; but however that he had directed the Jury, that there was evidence of the notification, proper to be fubmitted to them.

The learned Judge then ftated, that it had fince occurred to him, that the queftion upon the notification of the order of amotion, might become very material in fome events, namely, if it fhould be finally refolved, that the charter of *James* the 2d. did not operate to reftore the old corporation; or that the reftitution of the old corporation, did not diffolve or difplace the new corporation, under the charter of *Charles* the 2d. if the old corporation was never reftored, and the new corporation, in confequence of the order of amotion, was deprived of all its officers, and confequently could hold no legal affembly, or ufe any means to perpetuate itfelf, (and in point of fact, that corporation never did affemble again) it feemed as if there was no lawful corporation in *Chefter* at this day. Or if the old corporation was well reftored, but the reftoring to them their franchife of being a corporation, did not operate to difplace or diffolve the new corporation, it fhould feem as if there would be two bodies corporate exifting in *Chefter* at the fame time; but in confequence of the order of amotion, one effectually difabled to act, and now probably diffolved, by the natural death of its

members,

members, the other active and perpetuating itself in the regular course. And in that case the question now depending would be a question touching the election of an alderman of the old corporation; in which case it seemed to be impossible to maintain the election under the charter of, *Charles* the 2d. it being in his judgment most clear, that the old corporation did not accept that charter.

That at the trial the counsel for the defendant had insisted, that the judgment in *quo warranto* had dissolved the corporation; and that the charter of *Charles* the 2d. created a new corporation. That the charter of *Jac.* the 2d. could not restore the corporation which had been dissolved, but might be accepted by the new corporation, and might enlarge the powers of that new corporation. And that the question in the third issue was, touching the acceptance of the charter of *Charles* the 2d. by the citizens at large, and not by the old corporation. But, he stated, that it had since occurred to him, that it was a question which might deserve consideration, whether upon the issues joined upon these pleadings, it was open to the counsel for the defendant to put the case in that manner; the plea stating in effect, that at the time of granting the charter of *Charles* the 2d. there was a corporation by prescription, existing in *Chester*, which seemed to confine the question of acceptance in the third issue, to an acceptance by that prescriptive corporation.

The *Court* here observed, that if all the points of law, which might arise in this case, were to be gone into, they were of too much importance to be decided when the bench was not full.

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And they recommended it to the counsel to confine themselves in their arguments to the third, fifth, and ninth issues, on the acceptance of the charter of *Charles* the Second; because if it should turn out either to be a verdict against evidence, or that the question was not properly left to the Jury, as to those issues, to exercise their judgment upon, that would be a sufficient ground for a new trial, and the questions of law would be open hereafter.

Adair Serjeant, *Wood*, *Milles*, *Lane*, and *Topping*, against the rule, argued very fully on the verdict on those issues, as it was warranted by the evidence alone; in the course of which two questions were made.

1st. That the charter of *Charles* the Second, was not accepted in point of law; because an acceptance of a charter must be by a majority of those persons to whom it is granted. Now it appears on this charter itself, that it was granted to the citizens and inhabitants of *Chester*. And the question is, Who are meant by *citizens*, as contradistinguished from *inhabitants?* It could only mean those persons who had been incorporated before the judgment of *ouster* in the *quo warranto* information, and who were the ancient freemen of the city.

According to *Bagge*'s case (a), a charter must be accepted by a majority of the persons to whom it is directed, for the acceptance of a few will not bind the rest. So if a part of a corporation apply for new privileges, it will not bind the rest, unless they consent. The inhabitants of a town cannot be incorporated without the consent of a major part of them (b), and without their consent the charter of incorporation is void. In the *King* against

(a) 1 Rol. Rep. 226.

(b) 1 Brownl. 100

Askew

(c) 4 Burr. 2200. *Askew* and others (c), Mr. *J. Yates* said the Crown cannot compel persons to become corporators against their assent; and that consent can only be testified by their being admitted. But in this case there was no evidence which tended to shew that this charter had been accepted by a majority of the old freemen, thirteen only of whom were admitted; and the proof of that issue was on the defendant. This partial acceptance, therefore, could not operate. But it was contended at the trial, that the charter was at all events accepted as to the election of aldermen: now that argument cannot be supported, if (as was also contended) the judgment of *ouster* entirely dissolved the whole corporation, for then it would be a grant of franchises to a new body of men, who could not in point of law accept the charter in part only. Then, according to the defendant's argument, this charter must be considered to have been accepted in *toto*, or not at all. And if the Jury were not warranted by the evidence to find a verdict for the defendant on the ninth issue, in point of fact, they could not find for him on the third in point of law: and if any part of the charter was not accepted, the ninth issue must fall to the ground, for that is, that it was accepted *in all things*. The opinion of the Court in the case of the *King* v. *Johnson* (a), is extremely strong to shew that the charter of *Charles* the Second was never accepted.

(a) Durnford & East 1 V. 3[illegible].

2dly, But even if the Court should be of opinion with the defendant on the acceptance, yet the charter itself is void on two grounds; in which case it would be nugatory to grant a new trial upon the question of acceptance of a

charter,

charter, which if accepted is void. 1st: A charter granted in a county palatine, must have the county palatine seal. The county palatine was united with the Crown in the reign of *Edward* the First. And in *Selden* (b) it is said, " that the laws and rightful usages of a county " palatine are to be preserved." It was by King CHARLES as *Earl* of *Chester*, and not as *King* of *England*, that this corporation was created. Many cases have adjudged, that when a seal is necessary to the validity of a grant within a county palatine, it must be under the seal of the county palatine. *Moor*, 874. *Lutw.* 1232. A presentation to a living within the county palatine, may be good without the seal of the county palatine; and the reason of that is, because it may pass by parol. But a grant of the next avoidance is void, for want of the county palatine seal, 2 *Rol. Abr.* 182. *D.* 1, 2. 1 *Brownl.* 182. It is sufficient, in prescribing for a franchise, to say that it is within his county palatine, which has *jura regalia*, and by reason of that he claims such franchises; of which one is, to create corporations. 2 *Bulstr.* 226, 7. In answer to an observation from the Court, that the Chief Justice, and Attorney-General of *Chester*, were appointed under the great seal; it was said that by the *stat.* 27 *H.* 8. *c.* 24. §. 5. justices of assize, &c. within the county palatine of *Lancaster*, were to be appointed under the king's usual seal of *Lancaster*, in *manner and form as hath been accustomed*. And it appeared by the 18th section of that act, that Sir *H. Englefield* had been appointed justice of *Chester* and *Flint* by letters patent under the seal of the county palatine. And

(b) Parke. 2. c. 5. p. 530.

And that the appointment of the Chief Justice of *Chester* under the great seal of *England*, was by virtue of the *stat.* 34*th* and 35*th H.* 8. *c.* 26. §. 10. That as to the Attorney-General, he was appointed under the great seal: because he acted as well without the county palatine as within it. And 2dly. This charter is void on account of the general power of amotion reserved to the king. It is a condition which the law will not endure; the consequences of which would give the king a power which the law has expressly denied him. *Palm* 501. Sir *W. Jones*, 168.

A grant by the king to the subject, which is against law, is void. 2 *Rol. Abr.* 164. 2 *Inst.* 533. 1 *Rep.* 43. b. 5 *Rep.* 55. b. And though where to a grant by one subject to another a condition is annexed, which is either impossible or illegal, the condition only is void, yet in the case of a grant by the king, the whole grant is void. 2 *And.* 156. 2 *Freem.* 17.

Bearcroft in support of the rule observed, that the third, fifth, and ninth issues, altogether formed a question of fact only. And as the learned Judge had mis-directed the Jury, in telling them the question was, whether the charter of *Charles* the Second was accepted by the *old corporation*, instead of the *citizens* and *inhabitants*, the defendant was intitled to a new trial. The question left to the Jury was not the true one; for the issue joined was on the acceptance by the *citizens and inhabitants*, to whom it was directed, and not by the *old corporation*, who (the defendant contended at the trial) had no legal existence after the judgment of ouster. The old corporation were

not

not known by the name of the *citizens* and *inhabitants*. Thofe terms were defcriptive of the perfons to whom the charter of *Charles* the Second was directed. The word "citizens" does not mean "freemen," as freemen of the old corporation; for they were extinct at that time: but the expreffion may be accounted for in this way; there had been a city, and a corporation; in common parlance the inhabitants were known by the name of the *citizens* of *Chefter*: The word "inhabitants" was added for the purpofe of preventing any miftake; and they are ufed as convertible terms. The acceptance of a charter, in this cafe, was a pure fimple queftion of fact, without any mixture of law. And this has been confounded in the argument by the counfel againft the rule, with the cafe of a charter granted to an exifting corporation. He admitted that it would be a queftion of law, whether a part of an exifting corporation might or might not have accepted a charter; or whether they could partially accept or not. But this being a charter to a new corporation, there was fufficient evidence given at the trial to be left to the Jury to determine as to the acceptance of it in fact.

Bower, *Leicefter*, *Plumer*, and *Manley*, were to have argued on the fame fide; but they were ftopped by the Court.

Ashhurst, *J.*—The only queftions for our prefent confideration are, Whether the Jury have done right in finding their verdict as they have done, againft the acceptance of the charter of *Charles* the Second; and whether the Judge, who tried the caufe, was or was not correct in his manner of fumming up to the Jury?

As

As to the manner in which the queſtion was left for the Jury upon this part of the caſe, I am of opinion that the Judge was in ſome degree miſtaken; for he has ſtated to us pointedly, that he told them, that he thought there was in fact no evidence that the *old corporation* had accepted the charter of *Charles* the Second. In a matter of ſuch conſequence, I ſhould have thought, that if it were only a queſtion of fact, at all events there was evidence on this point, ſufficient to be left openly and fully to the conſideration of the Jury, without any ſuch ſtrong directions as were given. In the firſt place I think the learned Judge was miſtaken in telling the Jury, that the queſtion was, whether the charter of *Charles* the Second was accepted by the *old corporation* or not. That was not the iſſue upon the pleadings; for the words of the iſſue are, "That the letters patent were not duly "accepted and agreed to by the *citizens and* "*inhabitants* of the city of *Cheſter*;" which could not mean the *old* corporation. For it could only be accepted by the perſons to whom it was directed at the time it was made: but the old corporation did not exiſt at that time; for they were diſſolved by the judgment in the *quo warranto*. They no longer exiſted as a body. If they were not diſſolved, the queſtion might have been different; therefore, in reaſon, the only queſtion could be, whether this charter was accepted by the perſons to whom it was addreſſed, who were the *citizens* and *inhabitants*. Now this queſtion was not left to the Jury at all; the only queſtion having been, whether the charter was accepted by the old corporation.

 Now

Now with regard to the facts which were laid before the Jury in proof of the issue, respecting the acceptance by the *new* corporation, there were many instances: indeed the Judge himself says, that the evidence was all one way during three years. Several instances are stated of acts done by the new corporation, which could only have been done under the charter of *Charles* the Second; [which Mr. *J. Ashburst* here enumerated.] These were such a degree of evidence as should have been left to the Jury: and it does seem to me that the evidence was all on one side during that period. The evidence of those acts should at any rate have been left to the Jury, whatever verdict they might ultimately have given. And if they had been of opinion, that the charter had been accepted, and acted under, during those three years, that would have been conclusive. For the charter once accepted and acted under, for three years, was accepted as much as it could be, and must ever afterwards be taken to have been accepted; and the corporation could not afterwards determine upon keeping those franchises which were beneficial to them, and rejecting others which were not so. At all events this evidence should have been left to the Jury. And I agree with the learned Judge in the opinion which he has delivered, that courts and juries ought to lean in favour of ancient usages, especially if they tend to preserve the peace and quiet of corporations.

As to the questions of law which may arise in this case, they are matters for future consideration; therefore I shall not enter into them at present. And as they are of great

importance, the decifion ought to be fatisfactory to all the parties.

As this is a queftion on which the exiftence of the corporation depends, and as the ninth iffue is thought the moft material, I am of opinion that it fhould be tried again.

BULLER, J.—This is an information in the nature of a *quo warranto* againft the defendant, to fhew by what authority he claims to be an alderman of *Chefter*? The defendant, in anfwer to this information, has ftated a charter of the 37th of *Charles* the Second, which he fays was granted, not to the mayor and citizens, who were the old corporation, but to the citizens and inhabitants, and accepted by them: he has then derived his title under it.

On this plea, three iffues have been taken.

1ft. That the charter was not granted. 2dly. That it never was accepted by the citizens and inhabitants. 3dly. That in this charter there was a claufe which enabled the king and his fucceffors, by an order of privy-council, to put an end to this corporation, by a power of amoving them, without affigning any caufe; and that King *James* the Second made fuch an order, which was notified to the corporation. On thefe three iffues, the event of the caufe muft finally depend.

The others might have been difpenfed with. Though I have ftated thofe three iffues, they are more than are neceffary, in order to difpofe of the queftion now before us.

For as to the objection, which was taken by one of the counfel againft the rule, that the charter of *Charles* the Second was void, becaufe it had not the feal of the county palatine of *Chefter* affixed to it, there is no founda-

tion for it. The cases which were cited, do not apply; for they are cases of grants within the county palatine of *Lancaster*. And it is observable that, even in one of those cases cited, it was held by Lord C. J. *Treby*, that a corporation made within the duchy, and not in the county palatine, is without warrant (a). But he said within the county palatine, the king *may* create a corporation under the duchy seal, because the Duke of *Lancaster* had *jura regalia*. But it does not follow that, because the king may create a corporation within the county palatine, under the duchy seal, he *cannot* do so under the great seal.

(a) Lutw. 1237.

Besides, cases which arise within the county palatine of *Lancaster* are not applicable to the present. They depend on a particular statute (b), which is confined to the county palatine of *Lancaster*. With respect to offices granted under the great seal of *England* to be exercised in *Chester*, it is said that they depend on the statute 34th and 35th *Hen*. 8. *c*. 26, which (as it was contended) enacts, that offices in *Chester* shall be granted under the great seal of *England*, and the chief justice is particularly mentioned. But on adverting to that statute, the argument does not appear to be well grounded; because that act relates only to *Wales*, and not to *Chester*. Besides, before the passing of that statute, the crown had used to grant offices in *Wales* under the great seal: for there is a clause (c) in that statute, which says, that commissions under the great seal *already granted* shall be in force. Another circumstance, worthy of observation, is, that the sheriffs of *Chester* are appointed at *Westminster* in the same manner as the other sheriffs in *England*. It is also to be remarked,

(b) 1 Ed. 4.

(c) S. 11.

 that

that the charters of *Charles* the Second, and *James* the Second, are neither of them under the ſeal of the county palatine of *Cheſter*; but they are both under the great ſeal alone. However, this is not the point now before the Court, which is only as to the acceptance of the charter of *Charles* the Second.

And as to that, it is material, firſt, to conſider to whom that charter was granted; and, ſecondly, by whom it is ſaid to have been accepted. I think there was a miſtake at the trial by the Judge, in leaving the queſtion to the Jury, whether the *old* corporation had accepted this charter? Nothing is more clear than that the crown, at the time of granting this charter, conſidered the old corporation of *Cheſter* as totally annihilated, and extinguiſhed. It was not granted to them as to a corporation then in exiſtence. And with regard to the term "*citizens*," the counſel in ſupport of the rule has given the true anſwer to that obſervation. Then the queſtion is, whether the citizens and inhabitants had accepted the charter of *Charles* the Second or not? I feel leſs difficulty in differing from the learned Judge, who tried the cauſe, becauſe he has ſtated to the Court that he himſelf entertained conſiderable doubts at the time, and that he hazarded an opinion, that the judgment by default in the *quo warranto* did not diſſolve the corporation, but that it only ſeiſed the franchiſes into the king's hands, and thereby ſuſpended the exerciſe of the functions of the corporation. and on that ground conſidered the queſtion as being whether the old corporation accepted the charter or not?

As to the facts of the acceptance ſtated to have been proved, there is ſuch a body of

 evidence

evidence during the courſe of three years, as in my opinion leaves the queſtion without a doubt. And if the corporation accepted the charter only for an hour, that is concluſive for ever; it cannot afterwards be ſaid, that they had not accepted.

[Here Mr. *J. Buller* commented very fully upon every part of the evidence, from whence he took occaſion to obſerve, that there was ſufficient evidence to have been left to the Jury, as to the acceptance of the charter of *Charles* the Second, by the citizens and inhabitants of *Cheſter*.]

I agree with the learned Judge, that the election of the defendant ſhould be ſupported if it can be ſo.

If on the evidence there is no ground for ſaying that the charter was accepted, it will be impoſſible to ſupport it. But all the evidence goes to ſhew an acceptance; and there was no contrariety.

Another objection has been made, that it does not appear, negatively, that the charter was not accepted by a *majority* of thoſe named in it. I am by no means ſatisfied that it was neceſſary that it ſhould be accepted by a majority of them. I hold that there is a great difference between a charter granted in general terms, to incorporate the inhabitants of a city, and a charter like the preſent, which creates diſtinct parts of the corporate body, fills up ſome of the offices by name, and leaves it open to them to elect a number of freemen.

What is ſaid by Mr. *J. Yates*, in the caſe cited from *Burrow*, exactly agrees with what I have juſt laid down. That was the caſe of the college of phyſicians. In the charter granted to them, ſix perſons by name, and all

others of the faculty, of and in the city of *London*, are made a body corporate: but the Court held that all the practising physicians in *London* were not, by virtue of this charter, members of the corporation.

Lord *Mansfield* said, that the corporation were only bound to admit every person, whom they, on examination, thought fit to be admitted; and that any person who came within that description, had a right to be admitted. *Yates*, *J* said, (a) "I am far from thinking "that all the men of and in *London*, then "practising physic, were incorporated by the "charter. The *immediate* grantees under the "charter, were the six persons particularly "named in it. The rest were to be admitted "by them. They were not, *ipso facto*, made "members. They were first to give their "consent, before they became members: they "could not be incorporated without their "consent." Now, that charter seems applicable to the present case. For the king, by this charter, appointed a certain number of aldermen, and a certain number of common-council-men. These, then, according to the language of Mr. *J. Yates*, are the immediate grantees of the crown; and a power is afterwards given to them, to swear freemen upon their request, they first taking the oaths. Therefore, it appears to me, that these freemen stand in the same light, in which those persons do, who practise physic in *London*. The corporation have a power delegated to them, to swear in certain persons on their doing particular acts. But if the law were not so; if any number of freemen had accepted, it would have been sufficient: for the freemen are an indefinite body. And, in a corporation consisting

(a) 4 Burr. 2199.

ſiſting of different integral parts, if any of the freemen, being an indefinite body, attend the meetings of the corporation, it is ſufficient. It is not required, in all caſes, that a majority of the whole body ſhould be preſent. And if a ſmaller number than a majority of an indefinite part of the corporation, are ſufficient to conſtitute a lawful aſſembly for doing corporate acts, after they are incorporated, it will be difficult to find a reaſon why the ſame number may not accept the charter. Whether after hearing the opinion of the Court on theſe points, the parties may chooſe to go to trial again, in this caſe, is for their conſideration. But if the cauſe ſhould be tried again, theſe pleadings are ſo defective, that I recommend it to both parties, that they ſhould be amended.

To begin with the plea: it ſets out with ſtating, "that the mayor and citizens of *Cheſ-* "*ter* have, from time immemorial, and by "divers charters, and grants of divers kings "and queens of *England*, been a body cor- "porate and politic, in deed, and in fact."— It is impoſſible to ſuggeſt any reaſon why this averment was made: it was likely to have the effect which it produced at the trial, of embarraſſing the cauſe, and raiſing the doubt whether the charter of *Charles* the Second ſhould or ſhould not be conſidered to have been granted to a corporation then in being. It is true, that the plea has not actually ſtated that they were a corporation, at the time when the charter of *Charles* the Second was granted: but this allegation is altogether unneceſſary. The defendant's caſe is, that this was an *original* charter of incorporation; and therefore it was immaterial for him to ſtate a prior

corporation. The defendant has then ſtated the charter in the proper way, " that it was " accepted by the citizens and inhabitants ;" but this is followed by another averment, which is quite new, and which is the foundation of another iſſue, namely, " that the mayor, al- " dermen, and common-council-men, or the " greater part of them, did exerciſe the li- " berty, privilege, and franchiſe, of making, " electing, and chooſing of aldermen of the " ſaid city, according to the direction of the " ſaid charter " Now this is perfectly nugatory and unneceſſary ; for, if the charter were accepted, they were bound to act under it : this Court would have compelled them to act under it. But the plea, in ſpeaking of the manner in which it was accepted, only ſays, that the charter, as to the election of aldermen, was duly accepted. It is impoſſible to ſupport this iſſue in any way. The averment proceeds on a miſtake, by ſuppoſing that a charter may be accepted in part, and rejected as to the reſt. The only inſtance in which I have ever heard it contended that a charter could be accepted in part only is, where the King has granted two diſtinct things, both for the benefit of the grantees : there, I know that ſome have thought, that the grantees may take one, and reject the other. However that may be, it cannot extend to this caſe. This corporation muſt either have accepted in *toto*, or not at all : if they could have accepted a part only of the charter, they would have been a corporation created by themſelves, and not by the King. If a charter directed that the corporation ſhould conſiſt of a mayor, aldermen, and twenty-four common-council-men, they could not accept the charter for the mayor

and aldermen only, omitting the common-council-men. It is impoſſible to ſupport this part of the plea; therefore this allegation, confining the acceptance of the charter as to the aldermen only, ought to be amended. In the replication, the proſecutor has taken the iſſue on the firſt averment larger than the plea; for it ſays, " that the ſaid mayor and citizens, " *at the time of the making of the ſaid letters* " *patent in the ſaid plea mentioned*, were not, " nor have, from time immemorial, been a " body corporate, *&c.*" neither can this be ſupported. There are three other replications; one of which introduces the order of privy council for amoving the corporation. I read that part of the charter in a different ſenſe from that in which it is underſtood by the counſel on either ſide: for the charter ſtates, that the King reſerves to himſelf " a " power by any order of him, his heirs, or " ſucceſſors, in privy council made, under " ſeal, to them reſpectively ſignified, to amove " them, or any of them." But on looking farther into the charter, it appears to me, that that clauſe does not warrant a general amoval of the whole corporation. It only means, that the King intended, and has by the words of the charter, reſerved to himſelf the power of amoving one or more of the individuals of the corporation who miſbehaved, and not of deſtroying the corporation itſelf: for it afterwards directs, that in caſe of ſuch amoval, the *remainder of the corporation* ſhould elect others in their room in the manner directed by the charter. If that be the true conſtruction of the charter, one of the replications is entirely out of the queſtion.

With reſpect to the other replication; it is

idle on this record to ſtate what was the ancient conſtitution of the corporation, before the judgment of ouſter in the *quo warranto*; becauſe the defendant has by his plea put his election upon the charter of *Charles* the Second: he muſt ſtand or fall by that; and therefore it was nugatory to ſtate the charter of *Henry* the Seventh, or any other charter granted to this corporation.

I have thrown out theſe hints, that the parties may take them into their conſideration. But if this record goes down to trial again in its preſent ſtate, and the Court ſhould entertain the ſame opinion that I do now, I do not know any caſe that can call more for the animadverſions or cenſure of the Court.

Rule abſolute.

New trial in quo warranto, where verdict for defendant.

In the caſe of the *King* and *Francis* in *quo warranto*, E. 28 G. 3. new trial granted, though verdict for defendant; the Court paying no attention to the objection that it was a criminal proſecution. It is in the nature of a civil proceeding. The *King* v. *Bennet* was mentioned, but the Court paid not the leaſt attention to it.

I believe, in the *King* v. *Francis*, one ground of the new trial was, that evidence was produced on the part of the defendant that proſecutor could have contradicted, but was *ſurpriſed*, not expecting ſuch evidence would have been given, and was therefore, at the trial, unprepared to anſwer it.

IX.

IX. Of other Matters respecting new Trials, &c.

(12.) *Of new Trials in Criminal Prosecutions.*

(b.) In actual Criminal Prosecutions.

Vide ante IV. *Rex v. White* and *Ward.*

Anon. M. 12 Car. 2. B. R. 1 Lev. 9.

A new trial shall not be upon an acquittal of the defendant in criminal and capital cases, otherwise upon his conviction.

This a prosecution for perjury.

INDICTMENT for *perjury*, and the defendant acquitted; and a motion was made for a new trial, on behalf of the King, because several witnesses were absent. *Windham, J.* held this grantable, not being touching life; to which it was answered, that new trials may be in criminal cases, at the prayer of the defendant, where he is convicted, not at the suit of the King, where the defendant is acquitted, any more than in criminal cases, which are capital; and where two cases were cited *ex parte regis*; *Twisden* said, this was in the late troublesome times, *et ex assensu partis*. And upon this *Cur' adv' vult*, and gave day to search for precedents. *Note*, that afterwards, *Mich.* 13 *Car. inter Regem et Bowden*, an information for perjury, and the defendant acquitted; and motion for a new trial upon affidavit, that one of the witnesses was absent by reason of sickness, denied per *Cur'*, the party being acquitted, may not be tried again, but after

after conviction, a new trial may be had for the defendant upon good cause; and *Trin'* 15 *Car.* 2. *Rex versus Fenwicke* and *Holt*, information for perjury, and defendant acquitted; motion for a new trial upon affidavit, that some of the witnesses were kept away by the practice of the defendant. *Windham, J.* held this grantable, being only in a criminal case, not capital. *Keeling* said, no precedent could be shewn of a new trial in a criminal case, any more than in a capital one, for the defendant's *character* shall not be drawn in question several times, for the same thing, any more than his life. *Forster* and *Twisden* directed an information to be brought for the practice, and that if it should be found, a new trial should be granted, to which *Windham, J.* agreed.

V. post.

M. 15 Car. 2.

And this case being moved again, *Forster*, *Twisden*, and *Keeling*, continued of the same opinion. *Windham contra*, and said, that in an information for the practice, he would not have the same punishment as he would have for the perjury, and therefore held a new trial grantable, without information for the practice. *Cæteri*, the course of the court is the law of the court, and it is better that one innocent person suffer, than that the law should be changed; *et Hil.* 15 & 16 *Car.* 2. in the case of Sir *John Jackson*, where he, upon an indictment for perjury, kept back the witnesses; information was brought against him for the practice, and he was convicted, and fined a 1000 marks; and therefore, (*Levintz* says) as I suppose, a new trial was granted; this information being brought by the direction of the Court with that intent, but I did not

Vide post.

not hear that any rule for a new trial was given at this time.

In an information for *perjury* found for the King, it was moved upon several affidavits, to have a new trial; and it was doubted by the Court, that although cause appeared to them for granting a new trial, if they had power to do this without the consent of the King's counsel, and it seemed to them that they had not *, but they agreed, that in debt by an informer, the Court might grant a new trial upon cause, without the consent of counsel, because there the party hath an interest.

Read v. Dawson, M. 13 Car. 2. B. R. 1 Sid. 49

If the Court may grant a new trial where the verdict is for the King, in an information, &c. V. Sid. 153. 1 Keb. 124. Pl. 53. 1 Jon. 165.

In *trespass* between Sir *John Jackson* and *Primate*, the verdict being against *Primate*, he indicted the witnesses for perjury: which being at issue and brought to trial, Sir *John* commanded his servants to beat and imprison the witnesses who were to prove the perjury, by which means they could not attend to give evidence, whereupon the defendants were acquitted. *Primate* moved for a new trial of the perjury, which was denied, being in a criminal case, as the party once acquitted shall not be tried again. But the Court directed an *information* against *Jackson*, and he was thereupon convicted. And now it is moved in arrest of judgment, because the *information* was by way of recital, as an issue was joined,

Rex v. Sir John Jackson. H. 15 & 16 Car. 2. B. R. 1 Lev. 124.

Q. as to new trial in a criminal case where the defendant is acquitted.

* The ground of the motion was, for improper behaviour to witnesses, and preventing them from attending to give evidence.

* New trial granted without the consent of the king's counsel, *V. Smith* and *Frampton*, 1 *L. Ray*. 63. So in 3 *W*. and *M*. *B*. *R*. between the King and Queen and *Stone*, in an information for perjury, a new trial was granted to the defendant, without the consent of the King's counsel, as mentioned by Mr. *Northey* in *Smith v. Frampton*, 1 *L. Ray*. 63. Strange reasoning in the case in *Siderfin*, as if the interest a man hath in his character is not of more importance than any property whatever!

Vide ante IV

and

and it does not ſay poſitively that an iſſue was joined and appointed to be tried, &c. *ſed non allocatur*, it being only by way of inducement, to the ſubſtance of the information, which is for the battery and detaining the witneſſes. 2. The *information* is againſt *Jackſon*, for procuring *A. et B.* to beat and impriſon the witneſſes, and *Jackſon* only tried, and convicted, and the others not yet tried, ſo *non conſtat* that they are guilty of the battery and impriſonment, and therefore *Jackſon* cannot be guilty of the procurement, of that which does not appear to have been done. But it was reſolved that he who commands is a principal and not an acceſſary, and he being found guilty, it ſhall be intended that the fact was done; and the Court impoſed a fine of £ 1000 upon *Jackſon*, and that he ſhould find ſurety for his good behaviour for a year, before he ſhould be diſcharged. But being ſpecially committed by the Court, at the ſuit of the King, they ordered that he ſhould not be charged with any action or execution during his impriſonment, without leave of the Court; and afterwards, *Primate* moved to have part of the fine towards his charges, and of this the Court would conſider. In the ſame term in Sir *Charles Stanlie*'s caſe, the Court would not permit him, being in priſon at the ſuit of the King, to be charged.

Information againſt A. for procuring B. & C. to commit a treſpaſs: he may be convicted of the procurement, although the others are not convicted of the fact.

Vide ante & poſt.

A priſoner at the ſuit of the King ſhall not be charged at the ſuit of a ſubject, without leave of the Court.

Court gives the proſecutor part of the fine.

I conceive now, if a priſoner is in cuſtody at the ſuit of the King, the Court would give leave to charge the priſoner with civil ſuits, executions, &c. and for bail to ſurrender him in diſcharge of themſelves.

Rex v. Fenwick and Holt, M. 15 Car. 2. B. R. 1 Sid. 153.

Sir *John Jackſon* procured himſelf to be diſcharged from a large debt, upon a trial for it, at the aſſizes in *Cumberland*, by the perjury of *F.* and

F. and *H.* of which perjury they were indicted, and to be tried the next assizes there; of which Sir *John Jackson* being informed, he procured the witnesses who were to give evidence against *F.* and *H.* of the perjury to be arrested for large sums, as they were going to the assizes, by which means the witnesses could not attend to give their evidence, and so *F.* and *H.* were tried, and acquitted; and upon affidavit of this practice, in *Trinity* term, a new trial was moved for, but the Court were in doubt if there should be a new trial, in case of perjury after acquittal; and if it could be, they would not grant it upon affidavit, but directed that this practice of Sir *John Jackson*, as it was a great misdemeanor, should be tried by information; and so it was at the last assizes for the same county, and the practice found; and now upon this verdict, it was often moved to have a new trial for the perjury, and it was said, that this is only a misdemeanor, as in trespass at the common law, and that there was not any danger of life; but all the Court (except *Windham, J.*) said, that they could not grant a new trial in the case of perjury, after an acquittal, inasmuch as the record of acquittal was before them; but in the case of a new trial, between party and party, there is not any record of acquittal here, for one party comes here and moves for a new trial for a misdemeanor, *&c.* and upon this the first *postea* is stayed, and not entered of record, and so a diversity; and although search had been made, yet no precedent could be found in this case, but where the new trial was by consent; and farther, although the mischief is great as hath been urged, yet we may not innovate the law, and they said that all the Justices at *Serjeants Inn*, in

Where there shall not be a new trial in the case of perjury. Vide ante, and 1 Keb. 124. Pl. 33. Jon. 163. 1 Lev. 9. 10.

in *Fleet-Street*, were of their opinion *scil'*, that there cannot be any new trial in this case, but for deterring others from such contrivances, they said that they would fine Sir *John Jackson* in a large sum.

But *Windham*, J. held, that a new trial might be granted in the case of perjury, and the books are only, that the life of a man shall not be put in jeopardy twice for one crime. But in this case the punishment does not extend to life, and if there be not any authority against us in this case, I understand that we may do so for the extending of justice, that the innocent may not be punished for the guilty, especially when the way or means by which the party escapes justice, is a greater offence than the first.

1 Leon. 180. *Nota*, In Hilary term following, Sir *John Jackson* was brought into Court, and had judgment to be fined a 1000 marks *, and to be imprisoned one *month* without bail, and to find security for his good behaviour for one year.

* Qu. Pounds.

One imprisoned for a misdemeanor shall not be charged in execution, without leave. Noy. 1. 3 Inst. 215. Sid. 90. 211.

And in this case it was resolved upon several debates, that Sir *John Jackson* should not be charged in execution, nor any other who is so committed for a misdemeanor, without leave of the Court, at the suit of any party, the same law as to putting in special bail to actions against him; and so it was said in the case of Sir *Charles Stanlie* the same term. *Vide Sid.* 159, 160.

Several cases and reports of the matter respecting Sir *John Jackson* have been given, that the reader may, if he can, understand what was determined by the Court upon the subject.

A new

A new trial was granted in perjury on the Judge's information, that it was a malicious prosecution; but it shall not be granted without such information, unless the Attorney-General or King's-counsel consent to it. *Vide ante, p.* 157, *n. et Post.*

Lander v. Elliot, Hil. Term, 3 & 4 Jac. 2. B. R. Comb. 75. New trial in perjury.

Upon an indictment for a libel, the defendant was by verdict acquitted; Mr. Attorney-General moved for a new trial, but it was denied: And the Court said, That anciently it was never done in criminal cases where defendants have been acquitted; latterly where it has been a verdict obtained by fraud or practice, as stealing away witnesses, &c. it has been done,* but never yet was done merely upon the reason that the verdict was against evidence. *Postea Mich.* 10 *W.* 3. *B. R. Per Holt, C. J.* in indictments of perjury we never do it, because the verdict is against evidence; but if you prove a trick, as no notice, &c. it is otherwise. *Vide* 1 *Lev.* 9. 124. *Ne Serra, si le def. soit acquit, alit. s'il soit convict.*

Rex v. Bear, P. 9 W. 3. B. R. 2 Salk. 646. Indictment for a libel, defendant acquitted, and new trial denied. V. Faresl. 31 & 37.

* Qu.?

On acquittal in perjury, no new trial, tho' against evidence: Contra, where there is a trick, as no notice, &c.

See 2 *Saund.* 336. The defendant in error, upon an error in fact, took out a record of *nisi prius*, and proceeded to trial at the first assizes after issue joined; yet held good, and a new trial denied.

Dennis v. Dennis.

The defendant was convicted of forgery, and would have moved for a new trial, without appearing in court; insisting that this differed from a motion in arrest of judgment. But the Court held there was no difference; for the verdict fixes such a presumption of guilt, that the Court will be sure of him, be-

Rex v. Gibson, E. 7 G. 2. B. R. 2 Stra. 968. Defendant after conviction must be in court, to move for a new trial. V. 2 Stra. 844.

fore they intimate any opinion: and even when the verdict was brought in, would have committed him, had he staid in court. And the Chief Justice mentioned the cases of *Regina* v. *Ridpath*, *Pasch.* 12 *Ann.* and *Rex* v. *Lunt et Wombwell*, in perjury, where the distinction now taken was over-ruled.

Rex v. the Parish of Silverton, H. 24 G. 2. B. R. 1 Wils. 298. No new trial where defendants are acquitted on indictment for not repairing an highway.

Indictment for not repairing an highway, and a verdict for the parish. It was now moved for a new trial (by Mr. *Pratt*) for misdirection, or over-ruling evidence at the trial, by reason whereof the parish was unduly acquitted; *per Curiam*, This is a criminal case, and new trials are never allowed where defendant is acquitted in a criminal case. So also it is in *qui tam*'s and informations in nature of *quo warranto*'s.

Rex v. Simmons a Jew, 25 & 26 G. 2. B. R. 1 Wils. 329. New trial granted for the defendant in a criminal case, upon the report of the Judge and affidavits of the Jury that the verdict was taken contrary to their meaning, and to the Judge's direction in point of law.

The defendant was indicted for putting into the pocket of one *Ashley*, three *ducats*, with a malicious intent to charge him with felony, and was tried before Mr. Justice *Foster*, at the last Assizes for the county of *Essex*, and found guilty generally as to all the counts in the *indictment*.

The Court was moved for a new trial upon the *affidavits of all the twelve jurymen*, "that "they only intended to find the defendant "guilty of putting the *ducats* into *Ashley*'s "pocket, and did not intend, or understand, "that they had found him guilty of putting "the *ducats* into his pocket, *with an intent to* "*charge him with felony*; and *Dodson* the *fore-*"*man* swears, that he declared at the bar to "the Court when they brought in their ver-"dict, *that they found the defendant guilty of*

"*putting*

"*putting the ducats in Ashley's pocket, but* "*without any intent.*"

Mr. Justice *Foster* reported, That after the evidence was gone through and summed up, the Jury departed from the bar to consider of their verdict, and gave a private verdict at his lodgings that the defendant was guilty; the next morning they all appeared in court at the bar, and being asked if they stood by their former verdict, they answered they found the defendant guilty. That Mr. Justice *Foster* then told them that there were *four counts* in the indictment, and that the evidence for the king was only applicable to the *third*, which charged the defendant with maliciously putting three *ducats* into *Ashley*'s pocket with an *intent* to charge him with *felony*; and told them that *the intent* was the principal thing to be considered by them, and that if they believed the defendant did not put the *ducats* into *Ashley*'s pocket *with an intent to charge him with felony*, they must acquit him, whereupon the foreman at the bar said, "*We find* "*him guilty of putting the ducats into his poc-* "*ket without any intent.*" But by some mistake, or misapprehension of the Court, or the Jury, or of both, a general *verdict* was taken that the defendant was *guilty*.

After this report, the *Jury*, by further affidavits, swear that there was a very great noise in court, and that when the Judge directed them to acquit the defendant if they believed he did not put the *ducats* into *Ashley*'s pocket *with an intent to charge him with felony*, they did not hear or understand him.

This question having been debated by five or six counsel on each side, the Court gave their opinion for a new trial.

Lee, *Chief Justice.*—There is no doubt but a *new trial* may be granted in a *criminal* caſe; and the true reaſon for granting new *trials*, is for the obtaining of juſtice; but to grant *them* upon the *affidavits of jurymen only*, muſt be admitted to be of dangerous conſequence. It appears to me from the *report* of my *brother*, and the *affidavits* of *Dodſon* the *foreman*, that this *verdict* was taken by a miſtake, for he ſwears that he declared in court, "that they "did not find the defendant guilty of any in- "tent," and therefore this is not granting a new *trial* upon any *after thought* of the *Jury*, but upon what the *foreman Dodſon* declared at the bar when they gave their verdict. I am very clear in my opinion there ought to be a *new trial*, and the rather, as this is a *criminal* matter.

Wright, *Juſtice.*—*New trials* are generally ſuppoſed to be more ancient than appears in the books, for want of reporters when they firſt began to be granted; every caſe of this kind muſt depend upon its particular circumſtances; the Jury, every man of them, come here and tell us that they were not underſtood, for that they declared at the bar they did not find the defendant guilty of *any intent*. My *brother reports*, that he told them if they did not believe the *intent*, they muſt acquit him; the *Jury* now ſwear "*they did not hear him*;" therefore I am of opinion it is a verdict *miſentered*, contrary to the declaration of the *foreman*, not contradicted by any of the reſt, at the time it was ſpoken at the bar; and that it is moſt plainly *no after-thought*, ſo that we may keep clear of the danger of granting *new trials* merely upon the *affidavits of jurymen*: I think this man has been convicted contrary to the

† judg-

judgment of his peers, that he has not had *Judicium Pariûm*, and that we are bound to grant *a new trial*; and this being a *criminal* case is more to be favoured as to a new trial, than if it had been a *civil* case.

DENISON, *Justice*.—The Court will be very cautious how they grant *new trials* upon the *affidavits of jurymen*, because it would be of very dangerous tendency; but in this particular case, which partly depends upon my *brother's report*, and partly upon the *affidavits of all the Jurymen*, I am very well satisfied there ought to be a *new trial*, because it appears both by the *report* and *affidavits* that this *verdict* ought not to stand, and that the *Jury* were mistaken in giving a *verdict* contrary to the direction of the Judge; and *that* is what I principally go upon, that it is a *verdict contrary to the direction of the Judge in a point of law*; one of the Jury said, "*the defendant had no intent*," then the Judge said, "*You must acquit him*;" some of the Jury swear they did not *hear*, others, that they did not *understand* the Judge.

FOSTER, *Justice*.—I am of the same opinion. I gave no direction at all in *point of fact*, only of law, "That if they did not believe the "*intent*, they must acquit the defendant," they told me "they did not believe any *in*-"*tention*;" this is a *verdict contrary to law*.

New trial granted upon payment of costs.

The defendant was tried before PERRYN, *Baron*, at the Spring Assizes, in 1777, at *Gloucester*, on an indictment for perjury. The indictment was found by the Grand Jury for the *county of Gloucester*. It stated, That, on the trial of an action brought in the *King's Bench*, in which the *venue* was in the *county of Gloucester*,

The King v. Gough. T. 21 G. 3. B. R. Doug. 760.

Perjury being committed in the Booth-hall, within the limits of the city of Gloucester, which is a coun-

Gloucester, between Lord *Ducie* and Doctor *Bosworth*, at the Assizes holden at *Gloucester* for the said *county of Gloucester*, the defendant was produced as a witness, and falsely, wilfully, corruptly and maliciously, did, among other things, depose in substance as follows, *&c.* whereas in truth, *&c.* and so the jurors aforesaid, *&c.* say that the defendant, *&c.* at the said Assizes held at the *said city of Gloucester*, in his evidence, committed false, wilful, and corrupt perjury. Then another act of perjury was laid on the same occasion, and at the same time and *place*. The record then stated, after the appearance of the defendant, and a plea of not guilty, that the sheriff of the *said county of Gloucester* was commanded to summon a jury of the said county of *Gloucester* for the next Assizes and General Session of Oyer and Terminer to be holden for the said county of *Gloucester*, and that, thereupon, such proceedings were had, that, at the Assizes and General Session of Oyer and Terminer holden at *Gloucester*, for the *said county of Gloucester*, on the 12th of *March*, 17 *Geo.* 3. a jury impannelled and returned by the sheriff of the said county of *Gloucester*, was chosen, tried, and sworn to try the prisoner.

ty in itself, on the trial of a cause before a jury of the county at large, the indictment may be found and tried by juries of the county at large. The king cannot by charter authorize the trial of crimes out of the county where they were committed. A new trial may be granted at any time before judgment.

Upon the trial, a *special verdict* was found, which stated: 1. A charter to the burgesses of *Gloucester* in the first year of *Ric.* 3. whereby that king granted to them, and their successors, that the town of *Gloucester* should be, "*unus* "*integer comitatus per se corporatus, distinctus,* "*et penitus separatus, a dicto comitatu* Glou- "cestriensi *in perpetuum, et non parcellum ip-* "*sius comitatus* Gloucestriensis; *et quod idem* "*comitatus sic corporatus, et a dicto comitatu* "Gloucestriensi *distinctus et separatus, comi-*

" *tatus*

" *tatus ville* Gloucestrie *pro perpetuo nomine-* " *tur*; salvis tamen et reservatis nobis, et hæ- " redibus nostris, quod justitiarii ad assizas in " comitatu *Gloucestriensi* capiendas assignandi, " justitiarii ad goalam in comitatu *Gloucestri-ensi* liberandam assignandi, nec non justiti-arii ad pacem in dicto comitatu *Gloucestriensi* conservandam assignandi, in tenandas sessiones " suas, ac etiam vicecomites comitatus nostri " *Gloucestriensis*, in tenendos, comitatus suos, " liberê possint, et eorum quilibet possit, *in-* " *gredi villam prædictam*, et easdem sessiones " et comitatus tenere de quibuscunque rebus " et materiis *extra dictum comitatum ville* " Gloucestrie *et infra comitatum* Gloucestri-" ensem emergentibus, sicut ante hæc tem-" pora tenere consueverunt presenti conces-" sione nostra in aliquo non obstante." The charter then declared, that the bailiffs of the town of *Gloucester*, should be sheriffs of the county of the town; that they should hold county courts from month to month; that they should exercise all the same powers, *&c.* belonging to the office of sheriff, within the limits of the town, as other sheriffs exercise in their bailiwicks; that all writs, *&c.* which would have been directed to the sheriff of the county, if the town had not been made a county in itself, should be directed to them; and that no other sheriff or his bailiffs should enter the town to do any thing belonging to the office of a sheriff, except the sheriff of the county of *Gloucester* to hold his county courts as aforesaid: 2. That this charter had been accepted: 3. That it had been confirmed by a charter of 5 *Hen.* 7. and declared to *be by authority of parliament:* 4. A charter in the 33d year of *Hen.* 8. under the privy seal, and *declared*

to be by the authority of parliament; whereby *Hen.* 8. incorporated the burgesses of *Gloucester*, by the name of the Mayor and Burgesses of the *city* of *Gloucester* and city of the county of *Gloucester*, and made it a city, and confirmed to the said city the former grants making it a county in itself: 5. That this charter was accepted: 6. A charter in the 24th year of *Car.* 2. confirming all former privileges contained in prior charters which had been surrendered; and containing a clause in effect the same and nearly in the same words with that above set forth from the charter of *Ric.* 3: 7. That this charter of *Car.* 2. was accepted: 8. That, during all the time aforesaid commissions of *nisi prius*, assize, oyer and terminer, and general gaol delivery, had been, from time to time, granted to divers justices, to hear and determine, try and adjudge upon the several matters and things to such commissions belonging, and arising, in the *said city of Gloucester*, and to deliver the gaols of the said city; and that other, and separate commissions of the same sort, had, from time to time, during all the time aforesaid, been granted to divers justices, to try and determine, &c. upon the several matters and things to such last-mentioned commissions belonging, and arising in the *said county of Gloucester*, and to deliver the gaols of the said county: 9. That the commissions both for the city and the county, had been executed *at a place in the said city of Gloucester* called the *Booth Hall*: 10. That, during all the time aforesaid, *the jurors for the city* had enquired and made presentment of such matters and things belonging and given in charge to the jurors for the city, and arising in the said city of *Gloucester* in the said place called the *Booth-*

hall,

hall, and that ſuch matters and things ſo preſented by the ſaid jurors, when tried, had been tried by a jury of the ſaid *city of Glouceſter*: 11. That the grand and petty juries for the *county* had exerciſed the ſame juriſdiction as to matters ariſing within the county: 12. That, during all the time aforeſaid, the ſeſſions of the peace for the *county* had been held in the *Booth-hall*: 13. That the iſſue in the indictment mentioned had been tried by a jury of the *county* in the *Booth-hall*: 14. That the defendant, being then and there ſworn, did upon his oath, in the ſaid place called the *Booth-hall*, commit wilful and corrupt perjury, in the ſeveral matters charged in the indictment.

The objection to this indictment was, that the offence had been committed within *the county of the city*, and that the juries of the county at large had no juriſdiction to find or try an indictment for any crime not committed *in the county at large*.

It came on to be argued, on *Wedneſday*, the 23d of *May*, by *Bearcroft* for the proſecution, and *Baldwin* for the defendant.

The Court directed *Baldwin* to begin.

He ſaid, the general poſition was clear, that offenders can only be indicted and tried by juries of that county in which the offence was committed. This nicety was formerly carried ſo far, that, 'till the ſtatute of *Edw.* 6. (a) if a perſon received a mortal wound in one county, and died in another, the crime could not be tried in either. 2 *Hale's Pl. Cr.* 163. 2 *Hawk.* *p.* 220. § 34, 35, 36. 4 *Black. Com.* 303. *Stedman's Caſe*, *Cro. Eliz.* 137. *Richard Thomas's Caſe*, *ibid.* (in which, the indictment being that the defendant at the Caſtle of *Lincoln* falſely depoſed, without ſhewing in what county, he was

(a) 2 et 3 Edw. 6. c. 24. Vide 1 Hawk. Pl. Cr. c. 31. § 13.

was discharged) and 1 *Salk.* 288. Such being the general principle, the counsel for the prosecutor must endeavour to distinguish this case by some of the clauses in the charters found by the special verdict. They will probably rely on the clause in the charter of *Ric.* 3. But by that clause, the justices for the county at large are only authorised to enter into the town, and to enquire of things there, which had arisen out of the county of the town. The true meaning of this charter was, to give the use of the *Booth-hall* to the judges and juries for the county at large, and to authorise their proceedings there, relative to matters within their jurisdiction. At the *Old Bailey*, which is within the city of *London*, juries for the county of *Middlesex* sit to try offences committed in that county; but, when perjury has been committed there on a trial before a *Middlesex* jury, such perjury is never tried by a jury of the county of *Middlesex*, but by one of the city of *London*. In the celebrated case of *Elizabeth Canning*, after a prosecution at the *Old Bailey*, for a crime committed in *Middlesex*, the indictment of the witnesses for perjury was laid in the city. In like manner on a trial at bar in *Westminster Hall*, from *Yorkshire* for example, though the cause is tried by a *Yorkshire* jury, if perjury be committed by a witness, he must be indicted and tried by a *Middlesex* jury. In 2 *Hawk. c.* 5. § 19, where this case of *Gloucester* is mentioned, and in the authorities there cited, all that is meant is, that juries of the county sitting in the city, may find and try offences committed in the county. The case in *Popham*, 16. (also reported in *Anderson*, 291) which will probably be mentioned on the other side, seems to be in favour of the

defendant,

defendant, for *the decision* only was, that the justices of assize and gaol delivery might sit in the city for things which happened within the county; and in a note at the end of the case it is said, that, by the commission for the county, a thing which happens in the town cannot be determined, albeit it be felony committed in the Hall during the sessions (a). Considerable pains have been taken to enquire if there is any precedent, or instance, in the city of *Gloucester*, like the present case, and none has been found. No inconvenience will arise if the Court should hold that this indictment cannot be supported, because the verdict states, that there are grand juries in the city, who may find offences committed in the *Booth-hall.*

(a) Poph. 17.

Bearcroft, for the prosecution, argued, that the perjury having been committed on the trial of a county cause, it must of necessity be taken, that, at that time, the spot where the offence took place was part of the county at large. It is no uncommon thing for the same spot to be considered, for different purposes, as being within different jurisdictions. The space between the high and low water marks, when dry is within the jurisdiction of the sheriff, but when it is overflowed, the sheriff and admiralty have *divisum imperium* over it (1). Before the charter of *Ric.* 3. this spot was clearly part of the county at large. By the statute of 6 *Ric.* 2. *cap.* 5. the justices of assize and gaol delivery are to sit in the county towns of the different counties; by 13 *Edw.* 1. *cap.* 30. trials at *nisi prius* are to be held before the judges of assize; and the authority of the judge at *nisi prius* is by the commission of assize, as is laid down by Lord Holt (*Salk.* 454). By giving authority to the justices for the

(1) Vid. 5 Co. 107.

the county at large, to try county causes within the limits of the town, the charter of *Ric.* 3. made the place where they sat part of the county at large for that purpose. The trial on which the perjury was committed was at *nisi prius*. The whole proceedings were void, unless the *Booth-hall* be considered as being, at that time, part of the county. All the judges in Queen *Elizabeth*'s time, in the case reported by *Popham*, agreed, that they might sit in the city for county causes, and that the king might, in making a separate county, save and except part of the jurisdiction within it, which the county from which it was taken had in it before. By the saving in the charter of *Ric.* 3. all that appertains to, and is connected with, the execution of commissions in the county is necessarily saved. It is true, that a felony committed in the Hall during the assizes for the county, must be tried in the city, because such offence is entirely unconnected with the execution of the commissions for the county. The case in *Popham* is more materially reported by *Anderson*, and *he* states, that the Judges were of opinion, that it was the intent of the charter, that the town of *Gloucester* should continue, for the purposes mentioned in the exception, to be part of the county at large. It may be true, that indictments for perjury before *Middlesex* juries at the *Old Bailey*, are laid and tried in *London*, but no inference can be drawn from thence with regard to *Gloucester*. There may be some particular provisions for that purpose in the charters of *London*, which charters are confirmed by act of parliament. Perhaps the prosecution in the present case might be in *either* county. In point of law, the *Booth-hall* was, at the

time,

time, in the county at large, and, in point of fact, and local situation, in the county of the city, and, therefore, the offence might be said to have been committed either in the one or the other.

Lord MANSFIELD.—It seems to me, as at present advised, to be the better opinion, that the crime might be laid in either county; but the question now before us is, whether it could be laid in the county at large? The doubt before the Judges, in the case in *Popham*, was as Mr. *Baldwin* states it (*viz.* whether the judges could sit in the city to try matters arising in the county at large)? But it is material to see how it was solved. In the time of *Ric.* 3. the town was part of the county at large. By his charter it was made a distinct county, but with an exception, that the judges for the county at large might still try causes there. The king cannot by his charter give judges a power to try in one county offences committed in another. That was admitted in the case before the Judges, as reported by *Anderson*. But, it was answered, that he had continued the city as part of the county at large. If this is so, the cause in which the perjury was committed, was tried in the county at large, and the witness was examined, and the crime committed in the county at large. This distinguishes the present case from that of the *Old Bailey*, which struck me strongly at first. The city of *London* has many charters and customs confirmed by act of parliament, and the custom of trying offences committed in *Middlesex*, at the *Old Bailey*, has probably been confirmed by act of parliament; for otherwise it would be void.

WILLES, *Justice*.—If it had not been for the case of the *Old Bailey*, I should have had no

doubt;

doubt; but, with regard to that, there is no occaſion to ſuppoſe a grant or cuſtom confirmed by act of parliament, becauſe the whole Court ſeems to think, that the indictment may be laid either way, and, at the *Old Bailey*, the uſage has been to lay the indictment in the city.

Ashhurst, *Juſtice*.—No argument can be drawn from the practice at the *Old Bailey*, unleſs we knew more exactly how the caſe ſtands; there may be an act of parliament enabling the judges to try matters there, which ariſe in the county of *Middleſex*. Here, I think, the indictment would have been good either way. The king cannot, without an act of parliament, give the judges a power to try in one county, facts ariſing in another. Therefore, the meaning of the charter muſt have been, to continue the town as part of the county at large, for the purpoſe of trying county cauſes.

Buller, *Juſtice*.—I am of the ſame opinion. There is no way of ſupporting the judicial proceedings at *Glouceſter* from the time of *Ric*. 3. but by conſidering them as having been had in the county at large; becauſe I take the law to be clearly as my lord and my brothers have ſtated it. We have no authority to compel a jury to come, or to adminiſter an oath, out of the county where the matter ariſes. Therefore, the meaning of the charter muſt have been, to leave the place as part of the county at large. I am very ſtrongly inclined to think the indictment might be laid in either, but, if there is a difference, I think this the moſt proper way.

The defendant was this day brought up for judgment, when *Buller*, *Juſtice*, read the re-

port of the evidence, and *Dunning* was heard on his behalf; after which, the Court observed, that, from the ſtate of the evidence, the conviction appeared extraordinary, and hinted that a new trial would be proper.

Dunning ſaid, he ſhould have made a motion for that purpoſe, if he had thought it was competent, after ſuch a long interval of time ſince the conviction. Upon this, Lord MANSFIELD declared, that it was ſtill competent, becauſe the report of the evidence coming regularly now before the Court, if enough appeared to raiſe an inclination in them to think the defendant ought not to have been convicted, they could only grant a new trial, or poſtpone for ever pronouncing judgment; for that there would be an abſurdity in a judgment on a conviction for perjury, where a fine of a ſhilling ſhould be impoſed as the puniſhment.

A new trial was awarded (a).

(a) Birt v. Barlow, E. 19 Geo. 3. Poſt IX. (16.)

IX. Of other Matters respecting new Trials, &c.

(13.) *Of Defendant's entering up Judgment against himself, where Plaintiff (who had recovered a Verdict with small Damages) would not enter up Judgment.*

Pettey v. Hockley, E. 20 Jac. B. R. Palm. 281.

BAXDAL of *Lincoln's-Inn*, moved, that inasmuch as the plaintiff had obtained a verdict against the defendant, and would not enter his judgment (because he was desirous of bringing trespass for the same trespass) that the defendant might enter the judgment against himself upon this verdict; so that he might have error, or attaint; and cited a precedent, *Hil.* 6 *Jac.* B. R. between *Hoggsflesh* and *Humbers*, in covenant where the defendant was suffered to enter judgment for the cause aforesaid against himself, where the plaintiff would not enter it, on account of the smallness of the damages; and it was ruled accordingly in this case by *Dodd* and *Chamberlaine*.

Dy. 194.

IX. Of other Matters respecting new Trials, &c.

(14.) *Of a Verdict right in Part, and wrong in Part, and of one Defendant being found guilty, and another acquitted.*

SATUR, a bankrupt, at the time of his going off, left ſome plate with his wife, who in order to raiſe money upon it, delivered it to her ſervant, who went along with the defendant to the door of Mr. *Woodward* the banker, and there the defendant took the plate into his hands, and went into the ſhop and pawned it in his own name, gave his own note to re-pay the money, and immediately upon the receipt of it, went back to the bankrupt's wife, and delivered the money to her. In trover for the plate, the Jury (conſidering the defendant acted only as a friend, and that it would be hard to puniſh him) found a verdict for the defendant. But upon application to the Court, a new trial was granted, upon the foot of its being an actual converſion in the defendant, notwithſtanding he did not apply the money to his own uſe. And upon a ſecond trial the plaintiffs obtained a verdict for the value of the plate.

Parker et al. v. Godin. M. 2 Geo. 2. B. R. 2 Stra. 813.
What meddling with the effects of a bankrupt is a converſion.

N. B. A difficulty aroſe upon the motion for a new trial, which was this. There were

other things besides plate in the declaration, and as to them the verdict *pro def'* was right; and yet a new trial must be granted upon the whole. But on consideration, the Court held, that could be no reason to refuse a new trial, for if the merits as to those other things were with the defendant, it would be found for him as to them.

But it was agreed on all hands, that if one defendant be acquitted, and another found guilty, that defendant can have no new trial. Sed qu.? *Strange pro quer'*.

In the case of *Edie* and another *v.* the *East India* Company, *ante* V. there were two counts in assumpsit, upon two bills of exchange, the Jury found for the plaintiff on the first count, which was right—For the defendant, upon the second, which was wrong, and the verdict was set aside generally.

IX. Of other Matters respecting new Trials, &c.

(15.) *Where the Court is divided on Motion for a new Trial.*

Cartlidge v. Eyles, Bart. H. 15 Geo. 2. Barnes, 442.
Court divided on motion for new trial: plaintiff had judgment.

AT *nisi prius* plaintiff had a verdict, and on a motion for a new trial, the Court were divided in opinion; and no rule being made, plaintiff was at liberty to sign final judgment.—*Chapple* for plaintiff; *Eyre* for defendant.

Chandler v. The hundred of Sunning, on the statute of Hue and Cry, H. 23 Geo. 2. Barnes, 458.
Plaintiff cannot recover for notes he does not sufficiently describe, but for what is sufficiently described he may recover.

On a case made upon a point reserved at the trial, where a verdict was found for plaintiff, subject to the opinion of the Court; Mr. Justice *Abney* and Mr. Justice *Birch* delivered their opinions, that though plaintiff cannot recover the value of Bank notes of which he was robbed to the value of £. 960, for want of a sufficient description thereof in his advertisement, in the *London Gazette*, yet he ought to recover for what is sufficiently described, (viz.) his watch and money, value £. 10, the words of the late act being to be taken distributively. Lord Chief Justice and Mr. Justice *Burnett* were of opinion, that nothing can be recovered. The words of the late act are, That plaintiff shall not maintain his action, unless he describes the robbers, &c. together with the goods and effects of which he was robbed: twenty days before the advertisement are given to the person robbed, to recollect a particular description. The party robbed ought to discover

as well as he can, all the goods he loſt, to give light to the Hundred to take the robbers. The perſon robbed gets nothing by the taking; the public indeed are benefited. A perſon robbed of a large ſum of money, probably cannot farther deſcribe it than that it was in gold and ſilver; but perhaps can deſcribe other particular things then loſt; which he ought to do. The deſcription of Bank notes by numbers, dates, and ſums (which in this caſe were omitted) are highly uſeful for diſcovery. No two have the ſame marks. If plaintiff, at the time of his advertiſement, had not known the numbers, *&c.* but recollected them afterwards, the action would lie. But on the trial he acknowledged that he knew them, and they were all particularly entered in his pocket-book at the time of the advertiſement. The Court being divided, no judgment could be entered on the verdict.

IX. Of other Matters respecting new Trials, &c.

(16.) *Of setting aside Nonsuits, and Nonpross's.*

IN *Northumberland* at the assizes, a plaintiff in *ejectment* was called and nonsuited, and this entered upon the record before the *venire*, or *distringas*, *&c.* was put in, and this appeared by the *postea* now produced, for it is only a nonsuit indorsed upon it, and the justices of *nisi prisis* had not power to nonsuit, for their power is by the *Habeas Corpora*, and for this cause the Court discharged the nonsuit, and gave leave to the party to proceed again.

Thompson v. Hudshet, M. 15 Car. 2. B. R. 1 Sid. 164. Nonsuit at nisi prisis before venire or distringas put in, discharged.

An action of *indebitatus assumpsit*, for money received *per* the defendant, to the plaintiff's use.

Temple v. Welds, P. 1 G. 1. B. R. Lucas, or 10 Mod. 315. Assumpsit for money had and received against a stake-holder.

Upon evidence, the case came out thus: The plaintiff and another laid a wager; the defendant held stakes; the plaintiff brought evidence, that he had won the wager. *Blencowe* that tried the cause, being of opinion, that the plaintiff had mistaken his action; because this money could not at the time of the action brought, be said to be money received to the plaintiff's use; since the defendant was not to pay the money, until the wager was *proved* to be won,—The plaintiff was nonsuited.

The plaintiff now moved to ſet aſide the nonſuit; becauſe occaſioned by the Judge's miſtaking the law.

Court.—Action well brought; for upon the wager won, the money was actually the plaintiff's, though he could not receive it before the fact was made appear.—*Sed adjournatur.*

1757. Bennett qui tam, &c. v. Smith. M. 31 G. 2. B. R. 1 Burr. 401. A regular non proſ. againſt a common informer, refuſed to be ſet aſide.

The Court refuſed *to ſet aſide* a *non proſ. regularly* obtained by the defendant, againſt the plaintiff, who was only a COMMON *informer*, (who ſued for a penalty of £. 10,000 upon the ſtatute of uſury) though the plaintiff offered to pay the coſts of ſetting it aſide.

For, though Lord MANSFIELD ſeemed to think that the caſe might, perhaps, have borne a different conſideration, in caſe the plaintiff had been the *party* REALLY INJURED, and had ſued in order to come at *juſtice and reparation*, for ſuch real injury; yet not only his Lordſhip himſelf, but

* Mr. Juſtice Foſter was not in court.

The whole Court (now * preſent) were clear and unanimous, that where a MERE *common informer*, who ſued for PUNISHMENT *only*, had been guilty of a ſlip or miſtake which put him *out of court*, and intitled the defendant to enter a *non proſ.* againſt him, they would not exerciſe their *diſcretionary power*, in ſetting aſide this *non proſ.* thus regularly obtained, and reſtoring the *mere common informer* to an opportunity of proceeding for the ſake of *puniſhment* only. And they diſtinguiſhed the preſent caſe, from caſes of AMENDMENT; which indeed the Court would not ſcruple to make, even in caſes of *qui tam* actions, where there was any thing to *amend* by; and which they had frequently done, in ſome inſtances that were mentioned, or at leaſt hinted at, as, in

 particular,

particular, the giving leave to *change the county* in a *qui tam* action, on Mr. *Norton*'s motion, not many terms ago.

Hutchinson Executrix, v. Brice, H. 11 G. 3. B. R. 5 Burr. 2692. Court will not set aside a nonsuit voluntarily suffered, and give plaintiff leave to reply de novo, such a replication as will make a new question.

The Court refused to set aside a nonsuit voluntarily suffered by the plaintiff, and to give him leave to reply *de novo*. He had replied, "that the *cause of action arose* within six years:" which fact he could not prove. He wanted, therefore, to set aside the nonsuit, and reply *de novo*: which, if he had succeeded in, he would have replied, "that the *writ of latitat* "issued within the six years." But

The Court said, that that would make a quite new question; which the plaintiff had before pretermitted, and had put the issue upon quite another foot, and upon a point which he could not establish.

Rule discharged.

Mr. *Dunning* was for the motion: Mr. *Wallace* against it.

Vide Robinson v. Raley, and *Alder v. Chipp*, post IX. (21.)

[illegible] others, assignees of Thickpenny, a bankrupt, v. Hogg. M. 11 Geo. 3. C. B. 3 Wils. 146. A new trial granted to plaintiff, without costs, he having been improperly nonsuited. The question, as to the trading of an innkeeper.

Trover for a great many goods, to the value of £.700. Upon not guilty pleaded, this cause was tried at the last assizes for the county of *Norfolk*, before Lord Chief Baron *Parker*. Whereupon it appeared on the plaintiff's evidence, by seven witnesses, that *Thickpenny* was an innkeeper; and that he not only sold liquors to his guests (*hospitantibus*) in his inn, but also sold divers quantities of wine, rum, and brandy, by four, five, and six gallons at a time, to several persons living two and three miles distant from his inn, for them to retail out and sell again, and had done thus for some years; whereupon it was insisted by the coun-

ſel for the plaintiffs, at the trial, that this ſort of trading by an innkeeper, made him liable to a commiſſion of bankrupt: but the *Chief Baron*, without hearing any other evidence, was of a different opinion; and ordered the plaintiffs to be nonſuited, with leave to move the Court for a new trial, without coſts, in caſe he was miſtaken in his opinion.

And now, upon the motion of Serjeants *Whitaker* and *Forſter*, to ſet aſide the nonſuit, the Court was clear of opinion, that the plaintiff ought not to have been called, but the matter ought to have been more fully ſifted and gone into at the trial; that it not appearing to the Court here, what proportion *Thickpenny*'s trade in his inn bore to his trading abroad and out of doors, they could not judge whether he was liable to be a bankrupt or not; and therefore they ſet aſide the *nonſuit*, and granted a new trial without coſts.

Nota. It was ſaid by *Wilmot*, Chief Juſtice, that if *Thickpenny*'s trade and profits in his inn was much larger than his trade and profits abroad out of the inn, he ſhould incline to think that he was not * liable to be a *bankrupt*. If it ſhould come out in evidence that *Thickpenny* got *£.* 600 *per annum* in his inn, and not 600 *l.* *per annum* by ſending out and ſelling liquors abroad; he ſeemed clear in opinion, that he could not be a *bankrupt*. However, as there was general evidence that he was a trader out of his inn, the plaintiffs ought not to have been nonſuited.

* Sed qu. if later determinations are not contra? And qu. farther, which are the moſt conſiſtent and agreeable to law?

Rackham v. Jeſſup & Thomſon. M. 13 G. 3. C. B. 3 Wilſ. 352.
Plaintiff claiming a right to cut ruſhes on a

The plaintiff *Rackham* being poſſeſſed of a ſmall tenement or cottage at *Theberton*, in the county of *Suffolk*, and an inhabitant there, and, as ſuch, claiming a right to cut down ruſhes, (without

(without ſtint as to quantity) on a certain waſte or common there, called *Theberton Common* or *Home Common*, and to take and carry away the ſame for his own uſe; employed *Rudd* and *Farrow* as his ſervants for hire, to cut down ruſhes for him there; who accordingly did cut down and mow about five or ſix loads of ruſhes for the plaintiff; which ruſhes ſo cut down for the plaintiff's uſe, and lying and being upon the waſte or common, the defendants took, and with carts and carriages, carried away the ſame, and converted them to their own uſe; whereupon the plaintiff brought *trover* againſt the defendants, who pleaded not guilty; and iſſue being joined, this cauſe came on to be tried before my brother *Whitaker*, at the laſt ſummer-aſſizes held for the county of *Suffolk*, when the plaintiff proved he was an inhabitant of *Theberton*, and that as ſuch, claiming a right to cut and take away ruſhes on *Theberton Common*, he, by his ſervants, cut down five or ſix loads of ruſhes, and that the defendants took and carried away and converted the ſame to their own uſe; whereupon my learned brother, being of opinion that the evidence given for the plaintiff was not ſufficient to ſupport this action, was pleaſed to order him to be nonſuited upon the merits, without hearing counſel, or any evidence for the defendants.

common, cuts 5 or 6 loads, which defendants carry away, trover lies. Plaintiff nonſuited by the Judge upon a ſuppoſition that he had not ſufficient property to maintain the action. The nonſuit ſet aſide.

Plaintiff at the trial proved his claim of right to cut ruſhes, &c. but the Judge nonſuited him without hearing the defendants.

And in this term, upon producing an affidavit of the facts above, I moved for, and obtained a rule upon the defendants, to ſhew cauſe why the nonſuit ſhould not be ſet aſide, and why there ſhould not be a new trial, for that the plaintiff had given evidence of his property in the ruſhes, and of a converſion by the defendants, and that my brother *Whitaker* ought to have left it to the Jury; and that he might make his report to Mr. Juſtice *Nares*,

in order for him to ſtate the ſame to the Court, which, at another day, he accordingly did, as follows:

The report of the Judge.

Mr. Juſtice *Nares*.—My brother *Whitaker* reports, that this is an action of *trover* for ſix loads of ruſhes, which, upon the general iſſue, came on to be tried before him at the laſt aſſizes for the county of *Suffolk*, when the plaintiff called ſeveral witneſſes in order to ſupport and maintain this action.

The firſt witneſs was *John Rackham*, who ſwore that the plaintiff rented a ſmall tenement or cottage at *Theberton*; that about a year ago he went to help the plaintiff to mow ruſhes upon the common called *Home-Common*; but theſe (ſays my brother *Whitaker*) I underſtand not to be the ruſhes in queſtion.

That —— *Rudd* and —— *Farrow mowed the ruſhes in queſtion for the plaintiff*, about five or ſix loads, which were all about the value of ten ſhillings a load. He further ſaid, upon croſs examination, that the ruſhes were mowed in the night, and that his uncle (meaning the plaintiff) kept a hog, but no other ſtock upon his tenement.

The ſecond witneſs was *Henry Scarlet*, who proved that the defendants *Jeſſup* and *Thomſon*, who were farmers, having or claiming ſome right of common upon the place where the ruſhes were cut, came with their carts, and carried away the ruſhes which had been cut down for the plaintiff by *Rudd* and *Farrow*, and that all poor people had a right to cut ruſhes. That this was all the evidence upon the fact.

The third witneſs was *John King*, who ſwore to right of common upon the place in queſtion, and that any one may cut ruſhes from the

the common without ſtint at any time, as well as every body in the pariſh; that every body in the world may cut ruſhes on the common.

The fourth witneſs was *John Woolnoth*, who ſwore to the ſame effect, that every one cut what ruſhes he thought fit, and ſold them to whom he pleaſed.

The fifth and ſixth witneſſes were *Stephen Goodwin* and *William Foſter*, who ſwore to the ſame general right of common in every body to cut ruſhes on the common.

Upon my aſking the plaintiff's counſel if they had any more evidence upon any other matter, they ſaid they had ſeveral more witneſſes, but all to the ſame purport with the laſt.

Upon which, I thought the plaintiff had not made out a caſe proper to be left to the Jury, becauſe I conceived that in this action, the plaintiff ought to make a title by direct or preſumptive evidence.

There being no direct evidence, the witneſſes who ſpoke to the poſſeſſion of the ruſhes, proved it was either obtained by *ſtealth*, or under a pretence of right of common, which I thought was illegal and void, upon which the plaintiff was nonſuited. This is the report of my brother *Whitaker verbatim*.

Upon this report being made to the Court, Serjeant *Forſter* for the defendants ſhewed cauſe why the nonſuit ought not to be ſet aſide, by inſiſting that the plaintiff had not proved that he had any legal property in the ruſhes, for that it appeared by the report, the plaintiff had cauſed them to be moved down, and cut in the night-time, and that the plaintiff obtained the ruſhes by *ſtealth*, or under pretence

of

of a right of common, which Serjeant *Whitaker*, before whom the cause was tried, thought was illegal and void; and therefore nonsuited the plaintiff very properly, he having proved no *legal* property in the rushes.

Serjeant *Wilson* for the plaintiff, in support of the rule to set aside this nonsuit, insisted that it appeared by the report, that sufficient evidence was given on the behalf of the plaintiff at the trial to support this action; it being proved that he was an *occupier* of a tenement in *Theberton*, and (as such occupier) had, or claimed to have a right to cut and take away rushes from and off this common, and that the plaintiff by his servants cut the rushes in the declaration, and the defendants afterwards took and carried them away; this he insisted was such evidence of property in the plaintiff, and of conversion by the defendants, (who appear to be mere strangers) that the defendants, if they had any legal defence, ought to have made it at the trial, and the issue ought to have been left to the Jury, for their verdict.

It was further said on behalf of the plaintiff, that supposing, for argument's sake, he had not any lawful right to cut rushes upon the common; yet as he claimed such right, as an inhabitant of *Theberton*, and gave some evidence thereof at the trial, *that* was sufficient to put the defendants upon their defence, and to have shewn or justified by evidence, what right they had to take and carry away the rushes in question, for the plaintiff claiming a right to cut rushes, had gained a property therein by cutting the same, sufficient to have put the defendants upon shewing that they had a better property therein; but they not having

shewn

ſhewn any right or property at all to the ruſhes, wrongfully took them away; and the plaintiff has been improperly nonſuited.

The caſe of *Woadſon* verſus *Nawton*, 2 *Stra.* 777. is ſomething like this caſe; *that* was treſpaſs for taking and diſperſing a load of *fern-aſhes:* the defendant pleaded that he was an occupier of land in *A.* the tenants whereof had right of common, and cutting *fern* in the *locus in quo*, and that the plaintiff came and wrongfully cut *fern* and burnt it, whereupon the defendant came and ſcattered it about, *prout ei bene licuit*, demurrer *inde.*—*Strange* for the defendant cited 1 *Roll. Abr.* 405. *pl.* 5. that a commoner may juſtify taking the cattle of a ſtranger *damage feaſant*, or abate hedges, 9 *Rep.* 112. b. 2 *Mod.* 65. and the difference is where it is the act of the lord, or the act of a ſtranger. *Sed per totam Curiam contra*, for if the plaintiff did him any damage, he has his action, but after the plaintiff had burnt the fern, and thereby converted it to his own uſe, the commoner has no right to come and diſperſe it; and judgment was given for the plaintiff; ſo in the caſe at bar, after the plaintiff had cut the ruſhes, they were his own property, and the defendants have not, by evidence, or pleading, ſhewn any right to come and take and carry them away. The caſe at bar, indeed, is an action upon the caſe in *trover*, and the caſe cited from *Stra.* 777. is in treſpaſs; but there are many caſes where a man may have an action of *trover* or *treſpaſs* at his election; as if one takes my goods by wrong and converts them to his own uſe, I can have *trover* or *treſpaſs* againſt him, and ſhall recover damages in either of thoſe actions.

A commoner cannot juſtify diſperſing the aſhes of fern cut and burnt by a ſtranger (the plaintiff) for, after plaintiff had burnt the fern, he had a property therein.

So

So if a man have wreck of the ſea by preſcription, or by the king's grant, if goods be wrecked upon his lands, and another taketh them away, he who hath the wreck ſhall have an action of treſpaſs *quare vi et armis* for thus taking away, without ſeiſure thereof *before*, *F. N. B.* 91 *D.* but in the very ſame caſe he might have had *trover* for the goods; and ſo was the caſe of *Biddulph*, Eſq. v. *Ather* in *C. B. Trin.* 28 & 29 *Geo.* 2. *Wilſon* 23. The plaintiff was lord of the manor of *Lancing* in the county of *Suſſex*; and being ſo, was intitled by preſcription to wreck of the ſea thrown upon that manor, and a *ſloop* being wrecked and thrown upon it, he brought *trover* againſt the defendant who had taken it away, as bailiff of the Duke of *Norfolk*, who alſo claimed to have wreck of the ſea in the ſame place, and ſome doubts ariſing upon the evidence given at the trial before Mr. Juſtice *Wilmot*, a ſpecial caſe was made for the opinion of the Court upon the point of evidence only; and no objection was ever taken or thought of, againſt the propriety of that action of *trover*, and judgment was given for the plaintiff.

The *giſt* of the action of *trover*, is the wrongful detainer of goods which are the property of another; and the *giſt* of treſpaſs for goods, is the wrongful taking and detaining them, ſo that wherever *treſpaſs* will lie for *taking goods of the plaintiff wrongfully*, it ſeems *trover* will lie for taking *goods of the plaintiff wrongfully*; ſo that there is no very material difference between the caſe in *Stran.* 777. and the preſent caſe.

One claiming a right to cut down wood,

There is a caſe in *Cro. Eliz.* 819. of *Baſſet* v. *Maynard*, and in 5 *Rep.* 24. *S. C.* very applicable

plicable to the present case cited by Serjeant *Wilson*; it was *trover* for certain loads of wood; upon a special verdict; the case was, Sir *Thomas Palmer* was seised of a great wood, and bargained and sold to one *Cornford* and his assigns, as many trees as would make 600 cords of wood, to be taken by the assignment of Sir *Thomas Palmer*.—*Cornford* assigns over his interest to the plaintiff. Afterwards Sir *Thomas Palmer* granted to the defendant so much of his wood as would make 4000 cords of wood, to be taken at the defendant's election.—The plaintiff afterwards by the assignment of Sir *Thomas Palmer* cut down the trees in question to make 600 cords; and the defendant claiming them by virtue of his grant took them.—And it was found that there was sufficient wood left for the defendant to take his 4000 cords. *Et si, &c.*—And upon this verdict it was moved, that here was not sufficient title found for the plaintiff.—For first, it is not found that the bargain and sale was for any sum of money, nor upon any consideration; *sed non allocatur*, for it is intended to be so, being found by the verdict. But if it had not been so found, it might peradventure, have been otherwise; as *primo mariæ. Dyer* 91. is.—Secondly, it was alledged that this grant to the plaintiff is void; for, until the assignment made by Sir *Thomas Palmer*, no interest vested in *Cornford* himself, so that he could not make any grant thereof over. But all the Court held the grant to be good: for being made to him and his assigns, he may make an assignee, which shall enure as a nomination to one, who is to have by the appointment of Sir *Thomas Palmer*. And it may well vest in him, as the interest also: and here he hath an interest before the assignment made

cuts it down; although he has no legal right to this wood, yet by cutting thereof he gains such a property therein, that trover lies against a stranger who takes it away.

made by Sir *Thomas Palmer*; insomuch, that if Sir *Thomas Palmer* will not assign it in convenient time, he himself may take them, and therefore he may assign this interest, as 44 *Ed.* 3. 43. is.—But admitting the grant to the plaintiff had been void; yet *Popham* said that the action was maintainable, because by the cutting down of them he had *possession*, and a good title against the defendant, and every stranger; and being cut down it was not lawful for the defendant to take them: for if one sell 1000 cords of wood, to be taken at the vendee's election, and afterwards the grantor himself, or a stranger, cuts down some of the wood, the vendee cannot take that which is cut down: but he ought to make his grant good out of that which is growing. As if *estovers* were granted unto him, to be taken in a great wood, and the owner of the wood cuts down some of the wood, the grantee cannot take *that* which is cut down; but he must take his *estovers* out of the residue; and if all be cut down, he hath not any remedy, but an action upon the case. So here, although the plaintiff had not a good title, yet his having *possession* of them, being cut down, sufficeth. *Quod Gawdy and Clinch concesserunt.* Wherefore it was adjudged for the plaintiff.

The grantee of estovers cannot take wood cut down by the grantor.

It was submitted to the Court by Serjeant *Wilson*, that this case of *Basset* v. *Maynard*, was directly in point, or rather stronger than the case at bar, for it shews that although *Basset* had not a good title to the wood, yet that having cut it down, he thereby gained possession thereof, and a good title against *Maynard* and every stranger. So in the case at bar, *Rackham* by cutting down the rushes on the common, gained possession thereof, and a

 good

good title against the defendants *Jessup* and *Thompson*, who have shewn no title at all to the rushes, but appear to be mere strangers.

Curia. A custom for all the inhabitants of *Theberton* to cut rushes on *Theberton Common* is a good custom; the plaintiff proved at the trial that he was an inhabitant, and that there was a custom for every body inhabiting *there*, to cut and take rushes on the place in question, that he (by his servants) having cut down five or six loads of rushes, the defendants took and carried the same away; this is such evidence of property in the plaintiff and conversion in the defendants, that they appear to be wrong doers, for they have neither by evidence or pleading shewn any right or title whatever to these rushes, and appear to the Court to be mere strangers. Indeed, if a person hath no colour of right at all to cut down rushes, or to take any other thing; he cannot, by cutting the rushes, or taking the thing, without any colour of right, acquire property therein; but in the case at bar the plaintiff proved he had a right to cut the rushes, that he did cut them, and we are all of opinion, that he thereby gained a property therein. As to what is reported by brother *Whitaker*, that the plaintiff's servants cut the rushes in the night-time, and the inference drawn from thence, that the rushes were cut, or obtained by *stealth*; the Court said, that in summer, when rushes are generally cut, the night-time, or very early in the morning, is the most proper time for that purpose; the Court also held the cases of 2 *Stra.* 777. and *Cro. Eliz.* 819. for good law, and seemed to think that the latter was a stronger case than the case at bar: whereupon,

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per totam Curiam, the rule was made absolute for setting aside the nonsuit, and for a new trial; without costs on either side, the plaintiff having been nonsuited upon a mistake of the Judge in point of law.

For the pleadings in this cause, see 3 Wils 338.

Birt v. Barlow, 19 G. 3. B. R. Doug. 162.

The Court, under particular circumstances, will permit a new trial to be moved for after the four days are expired. In an action for crim. con. an actual marriage may be proved by a copy of the register; and the minister, clerk, or subscribing witnesses to the register are not the only competent witnesses to prove the identity of the persons married.

This was an action of trespass and assault for criminal conversation with the plaintiff's wife. It was tried before BLACKSTONE, Justice, at the last assizes for *Kent*, when, by the direction of the Judge, the plaintiff was nonsuited.

On *Monday*, the 26th of *April*, *Rous* moved for a rule to shew cause why the nonsuit should not be set aside, and a new trial granted. *Wednesday*, the 21st day of *April*, was the first day of term, and, by the practice of this Court, all new trials (in causes tried in vacation) must be moved for within four days of the beginning of the term, including the first; so that *Saturday*, the 24th of *April*, was the last day for moving. However, *Rous* having stated, that he had understood that the four days were reckoned *exclusive* of the first, and BLACKSTONE, Justice, having desired, at the trial, that the opinion of the Court should be taken, the Court entertained the motion, which was founded on the ground of a misdirection in point of evidence; and the rule was granted. (c)

(c) Vide The King and Gough. Ante IX. (12.) (b.)

This day BULLER, *Justice*, read the Judges report, which was as follows:

The first witness called by the plaintiff was *Thomas Sharpe*, who proved a copy of the register of the parish of *St. Alfred, Canterbury*, in *hæc verba*—" 1767, N° 106, *John Birt*, " Esq; of parish of *St. Margaret, Rochester*,

" co.

" co. *Kent*, and *Harriot Champneys*, of this " parish, married by banns, 15 *December* " 1767, by *John Lynch*, minister. (Witnesses " *Robert Lynch*, *Francis Champneys*, *Anne* " *Lynch*, *Elizabeth Lynch*," (a). Another witness, (*Susanna* ———) was next called to prove the fact of adultery.—I was of opinion, that this was not sufficient evidence of the marriage, but that the identity of the parties must be proved, else it might possibly be a register of the marriage, not of the plaintiff and his supposed wife, but of some other persons of the same name. The counsel for the plaintiff then said, in the course of their examination to prove the adulterous intercourse, it would come out from the mouths of the witnesses, that the plaintiff's reputed wife was of the name and family of *Champneys*, and that they had long cohabited together, and were esteemed to be man and wife by all their friends and relations. I still thought that the evidence, so opened, would be insufficient, holding in conformity to the case of *Morris v. Miller*, reported in 4 *Burr.* 2057, (b) (and of which I also had a MSS. note of my own) that this was the only *civil* case in which proof of an actual marriage was requisite, as contradistinguished from acknowledgment by the parties, cohabitation, reputation, &c. That the *best* proof that could be given of an actual marriage was, by some person personally present at the solemnity, which, in my small experience, I had never seen an instance of not producing. If it did

(b) E. 7. G. 3. 1 Black Rep. 632.

(a) I presume the names of the husband and wife were also subscribed, although that was not stated in the report. It is expresly required by the marriage act, 26 *G.* 2. *c.* 33. § 15.

not appear that there were any perſons preſent beſides the miniſter*, and he was dead, perhaps other collateral proof might be admitted, which might render probable the identity of the plaintiff and his wife, and the perſons whoſe marriage was ſo regiſtered. But that in the preſent caſe, there appeared to have been no leſs than *five witneſſes preſent* at the marriage thus regiſtered, which was only eleven years ago. That the marriage act had directed the witneſſes to ſubſcribe their names to the regiſter, (†) in order to facilitate the inveſtigation of the legal evidence of marriages. And that 'till theſe five witneſſes and the miniſter were accounted for, as by ſhewing them all dead, or the like, I could not admit leſs proof than that of ſome perſon preſent to demonſtrate the identity of the parties. I accordingly nonſuited the plaintiff. After which, a proctor from the Eccleſiaſtical Court, then preſent, declared openly, that he had been ſubpœnaed by the plaintiff to prove, and could prove, the taking out of a *licence* for the marriage of the plaintiff and his reputed wife. I mention this circumſtance, though it could be no ground of my determination, as it ſhews *ſomething more than a bare poſſibility* that the plaintiff and his wife were not the identical perſons ſo regiſtered as marrying by banns."

† 26 G. 2. c. 36. § 15.

Kempe, Serjeant, and *Peckham*, ſhewed cauſe. —They argued, that the marriage act meant to introduce ſome more accurate proof of marriages than what was in uſe before the paſſing of that act. This purpoſe was expreſſed in the preamble to the 15th ſection. It had accord-

* Two witneſſes at leaſt, beſides the miniſter, are expreſsly required by the marriage act, § 15.

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ingly been enacted, by that section, that witnesses should be present who should subscribe their names to the register; and the purpose of such subscription must have been to point them out, that they might be produced when it should become necessary to prove the marriage. There is no case in the law where subscribing witnesses are necessary, and yet it is not necessary to produce them, or, if they are shewn to be dead, to prove their hand-writing. The register proved the marriage of two persons of the same name with the plaintiff and his wife, but could not shew that they were those identical persons.

Dunning, and *Rous*, in support of the rule, observed, that the preamble, to the section of the marriage act relied on, professed an intention to render the proof of marriages *more easy*, and it would be a strange solecism to contrive it so as to render them more difficult. It was admitted, that the proof of *a* marriage was complete, and no case could be shewn which had determined, that there could be no other evidence of the identity of the parties, but the testimony of persons present. Proof of the parties having been seen going to church the morning of the day mentioned in the register, or sleeping together that night, would surely be evidence of the identity, and so would proof of their having cohabited together, from the time of the marriage downwards. In an action for goods furnished to a wife, evidence of cohabitation and reputation is sufficient. In a case of criminal conversation, something more, *viz.* an *actual* marriage must be shewn. This is done by the register; and when that is coupled with evidence of cohabitation and reputation, the proof is complete. As the copy

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of the regiſter only was produced (and was all that was neceſſary) the witneſſes could not have proved their atteſtation, even if they had been called.

Lord MANSFIELD.—From the report it appears, that the ground of the nonſuit was an idea, that the identity muſt be proved by the miniſter, or ſome of the atteſting witneſſes, unleſs their not being produced is accounted for in the ſame manner as is required in the caſe of ſubſcribing witneſſes to a deed. The counſel for the plaintiff ſtated other evidence of the identity; whether ſuch as would have been ſufficient when produced (as that might, or might not be, according to the differences ariſing from the manner of ſtating it) I give no opinion: but the Judge decided that it was *neceſſary* to produce ſome of the ſubſcribing witneſſes. The clauſes in the marriage act relative to regiſters are of infinite utility to the kingdom. They were meant, as well to prevent falſe entries, as to guard againſt illegal marriages without licence, or the publication of banns. The regiſters are directed to be kept as public books, and accompanied with every means of authenticity. But, beſides facilitating and aſcertaining the evidence of marriages, they were intended for other wiſe purpoſes. They are of great aſſiſtance in the proof of pedigrees, which has become ſo much more difficult ſince inquiſitions *poſt mortem* have been diſuſed, that it is eaſier to eſtabliſh one for five hundred years back, before the time of *Charles* II. than for one hundred years ſince his reign. But this advantage would be loſt, and it would be very prejudicial if the act were ſo conſtrued as to render the proof of marriages more difficult than formerly. I take

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it for granted, that the law ſtands as it did before in that reſpect. Regiſters are in the nature of records, and need not be produced, nor proved by ſubſcribing witneſſes. A copy is ſufficient, and is proof of a marriage in fact, between two parties deſcribing themſelves by ſuch and ſuch names and places of abode, though it does not prove the identity. An action for criminal converſation is the only *civil* caſe where it is neceſſary to prove an *actual* marriage. In other caſes, cohabitation, reputation, *&c.* are equally ſufficient ſince the marriage act, as before. But an action for criminal converſation has a mixture of penal proſecution; for which reaſon, and becauſe it might be turned to bad purpoſes by perſons giving the name and character of *wife* to women to whom they are not married, it ſtruck me in the caſe of *Morris v. Miller*, that, in ſuch an action, a marriage in fact muſt be proved. I ſay, a marriage *in fact*, becauſe marriages are not always regiſtered. There are marriages among particular ſorts of diſſenters, where the proof by a regiſter would be impoſſible; and *Dennison, Juſtice*, in a caſe of that kind which came before him, admitted other proof of an actual marriage. But, as to the proof of identity, whatever is ſufficient to ſatisfy a jury, is good evidence. If neither the miniſter, nor the clerk, nor any of the ſubſcribing witneſſes, were acquainted with the married couple, in ſuch a caſe, none of them might be able to prove the identity. But it may be proved in a thouſand other ways: ſuppoſe the bell-ringers were called, and proved that they rung the bells, and came immediately after the marriage, and were paid by the parties; ſuppoſe the hand-writing of

the parties were proved; ſuppoſe perſons called who were preſent at the wedding-dinner, *&c. &c.*

Willes and Ashurst, *Juſtices*, of the ſame opinion.

Buller, *Juſtice.*—The original regiſter is not neceſſary to be produced, and it is only where *that* is required, that ſubſcribing witneſſes muſt be called. In this caſe, the wife's maiden name was *Harriot Champneys.* Suppoſe a maid-ſervant had proved that ſhe always went by that name till the day of the marriage, that ſhe went out that day, and, on her return, and ever ſince, was called *Mrs. Birt?* Surely that would have been evidence of the identity.

The rule made abſolute (*).

Goodtitle ex dim Robert Edwards, verſus Peter Bailey, E. 17 G. 3. B. R. Cowp. 597.

In ejectment which is a fictitious action to recover the poſſeſſion, the leſſor of the plaintiff ſhall not be permitted to defeat a ſolemn deed under his own hand, covenanting that the defendant ſhall enjoy the premiſſes, and alſo, for further aſſurance.

Upon ſhewing cauſe why the nonſuit entered in this caſe ſhould not be ſet aſide, and a new trial granted, the facts appeared to be as follows:

It was an ejectment brought for two tenements in the county of *Dorſet*, diſtinguiſhed by the names of the Greater and Leſs Tenement. The plaintiff claimed under the will of one *Nicholas Edwards*, dated *March* 12th 1750, by which he deviſed the premiſſes in queſtion "to his wife *F. Edwards*, for life, and after "her deceaſe to his brother *John Edwards*, to "be at his diſpoſal: but in caſe he ſhould "happen to die before the ſaid *F. Edwards*, "then he gave the premiſſes to his couſin "*Robert Edwards* (the plaintiff) and his heirs

* The cauſe was again tried at the enſuing aſſizes, and a verdict found for the plaintiff.

" and

"and aſſigns for ever:" and died ſoon after. Upon his death, *John Edwards* entered into and kept poſſeſſion of the *greater* tenement during his life; and by will deviſed *both* the tenements to the defendant *Peter Bailey*. He was poſſeſſed of ſeveral other premiſſes, which he deviſed to the leſſor of the plaintiff, by the ſame will: and died in the life-time of *Frances* the widow, who upon the death of *Nicholas* her huſband, entered into and kept poſſeſſion of the leſs tenement, till ſhe died.— Upon the death of *John*, *Peter Bailey*, the defendant, took poſſeſſion of the greater tenement, which *John* during his life had occupied. Soon after, *Robert*, the leſſor of the plaintiff, by deed of releaſe, bearing date the 5th of *January* 1764, reciting the will of *Nicholas*, and alſo reciting the will of *John Edwards* the brother of *Nicholas*; and further, that *Frances* the widow had ſurvived *John*, whereby the reverſion of the premiſſes were become veſted in him, *Robert*, in fee; reciting alſo that it had been agreed that he the ſaid *Robert* ſhould renounce all his right, title, and intereſt in the ſaid premiſſes to *Peter Bailey*, *the ſaid* Nicholas Edwards *having no power to deviſe the ſame*; he did thereby *renounce, remiſe, releaſe, and for ever quit claim* to the ſaid *Peter Bailey*, and the heirs male of his body, all the ſaid premiſſes, and all his right, title, and intereſt therein; with a covenant for further aſſurance. Subſequent to this releaſe, the widow died; and then *Robert*, the leſſor of the plaintiff, brought this ejectment. Upon the releaſe being read and proved, ſeveral objections were taken to it at the trial, on the part of the plaintiff. 1. That there was no *privity* of eſtate between the leſſor of the plaintiff and

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the defendant, at the time of the releaſe. To this it was anſwered, that it was not a releaſe by way of enlargement of the eſtate, but *pur mitter le droit*, therefore no privity was neceſſary: but this objection was given up. 2. That in reſpect of the leſſer tenement, the widow being in poſſeſſion, there was no eſtate in *Peter Bailey* at the time, upon which the releaſe could operate. 3. That it was fraudulent upon the face of it, being without conſideration; and alſo, for that the recital, relative to *Nicholas* having no power to deviſe the premiſſes was falſe; to prove which, the plaintiff in reply produced the will of *John*, the father of *Nicholas*, giving the premiſſes to *Nicholas* in fee. —But theſe objections were over-ruled by the Judge, who thought that as the leſſor of the plaintiff took a conſiderable eſtate under the will of *John Edwards*, under which will the defendant claimed, he ought not to be allowed to impeach it; and accordingly directed a nonſuit.

Mr. *Mansfield* and Mr. *Buller* now argued in ſupport of the nonſuit, and againſt the rule for a new trial. Mr. Serjeant *Heath contra*, for the rule.

For the defendant it was argued, that ſuppoſing the *releaſe* could not operate as *ſuch*, for want of a ſufficient poſſeſſion in the releaſee at the time, yet it might operate as a *grant* of the *reverſion*. It is a ſettled rule in the conſtruction of deeds, that if ſufficient appears to ſhew the intention of the party to convey, though it cannot take effect in the preciſe form in which it was intended, it ſhall operate in the way in which it can, rather than the intent of the parties ſhall be fruſtrated. *Sheppard*, in his *Touchſtone*, 82, ſays, " A deed

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"made to one purpoſe, may enure to ano-
"ther; if meant for a releaſe, it may amount
"to a grant of the reverſion; *or e converſo.*"
So in 2 *Wilſ.* 75, a deed, intended for a releaſe, was held to operate as a *covenant to ſtand ſeiſed*: and the caſes there cited eſtabliſh the doctrine. If ſo, nothing can be clearer than the intention of *Robert* to convey in this caſe; not only from the general words of the deed, but from the covenant for further aſſurance. But a deciſive anſwer is, that the plaintiff is eſtopped by his own deed. The claim he ſets up is expreſsly againſt his own deed, and the objections made to the form of it, go to defeat it. No man ſhall be ſuffered to do that. —As to the objection of *fraud*, becauſe the recital relative to *Nicholas* is falſe, the circumſtances manifeſtly ſhew there was ſome inſtrument, though none ſuch has appeared, under which *John Edwards* was intitled, which warranted him in taking poſſeſſion of the greater tenement, as he did, in the lifetime of the widow, and diſpoſing of them both at his death, notwithſtanding the will of *Nicholas*. With reſpect to there being *no conſideration*, the eſtate which the plaintiff took under the will of *John Edwards*, was a ſufficient conſideration, for his confirming the deviſe of the premiſſes to the defendant. But if it were not, as the plaintiff is content to take ſuch eſtate, he ought not to diſturb the other deviſees in the will. Therefore upon every ground the nonſuit was right.

Lord *Mansfield*.—As to the objection of fraud obſerved, there was no *evidence* of any fraud; that the recital did not appear to be the inductive cauſe of the releaſe; and unleſs ſome inducement was ſhewn, fraud could not

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be presumed. If any colourable evidence of fraud had been given, the nonsuit would have been wrong; because fraud in this case would be a matter of fact; of which the Jury are to judge. So if the plaintiff could have made out a case of *mistake*, it would have been equivalent to fraud. But nothing of the kind appears; and as to the consideration, it might be fair enough. It depends upon the treaty.

For the plaintiff as to the *other* point, it was contended, that admitting the rule laid down to be true in its fullest extent, yet nothing passed by the release in this case for want of proper operative words. There are appropriated terms to every conveyance: and where the word "grant" is used, being *genus generalissimum*, if the instrument cannot take effect according to its proper form, it shall operate in some other, if by law it can. But here the words are, "*renounce*, *remise*, *release*, and *quit* "*claim*," which are the special form of words adapted to a *release* only; therefore it cannot operate as a grant. And so is *Co. Lit.* 301. "A release cannot operate as a grant, because "it is a peculiar manner of conveyance adapt-"ed to a special end." In the case from 2 *Wils.* 75, the word "*grant*" was used; and so it was in the cases there cited. But here there is no such word, nor any thing equivalent to it, consequently nothing passed by the deed. If not, the defendant's case is not aided by the covenant for further assurance; for that at most conveys only an equitable right: and as to its being an estoppel, the plaintiff is not estopped from saying any thing, but that the defendant has *no interest*.

Lord Mansfield.—The rules laid down in respect of the construction of deeds are founded

in law, reaſon, and common ſenſe: that they ſhall operate according to the intention of the parties, if by law they may. And if they cannot operate in one form, they ſhall operate in that, which by law will effectuate the intention. But an objection is made in this caſe, which, it is ſaid, takes it out of the general rule and the doctrine of the authorities cited: and that is, that in the releaſe in queſtion the word "*grant*" is not made uſe of. But that the intention of the parties was to paſs all the right and title of the plaintiff in theſe premiſſes, is manifeſt beyond a doubt. One thing however is deciſive. This is a *fictitious* action to recover the poſſeſſion. In ſuch an action, if a man has made a ſolemn deed covenanting that another ſhall enjoy the premiſſes, and likewiſe for further aſſurance, it ſhall never lie in his mouth to diſpute the title of the party to whom he has ſo undertaken; no more than it ſhall be permitted to a mortgagor to diſpute the title of his mortgagee. No man ſhall be allowed to diſpute his own ſolemn deed. Therefore *quâcunq' via datâ*, the nonſuit was right. It would be very idle to ſet aſide the nonſuit, only to ſend the party into equity, and make him pay the coſts that way.

Aston, *Juſtice*.—This is the common wording of a releaſe: but though in the ſhape of a releaſe, if there are ſufficient words, it may operate as a grant. The laſt ground however is deciſive: it is clear from the general complexion and circumſtances of this caſe, that there had been ſome diſpute between the parties relative to the wills of *Nicholas Edwards*, and his brother *John*; and that this releaſe was an agreement between them for the purpoſe of adjuſting all matters in difference: and

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there is a covenant for further assurance. I think it would be extremely improper, after that, to let the party take a legal objection for the purpose of defeating his own solemn agreement.

Per Cur. Rule discharged.

Minns v. Baxter, M. 26 Geo. 3. B. R. Durnford and East. 1 V. 16.

The defendant is bound to search in the office, whether the plaintiff has brought in the issue roll, before he signs judgment of non pros, even though he may have searched on the expiration of the rule to bring in the roll.

Baldwin shewed cause against a rule, which had been obtained by *Shepherd* last *Trinity* term, calling on the defendant to shew cause, why the judgment of *non pros*, which had been signed in this cause, should not be set aside for irregularity. The irregularity consisted in this; the plaintiff had a four day rule to bring in the issue-roll, which expired the 14th of *June* last: the defendant on that day searched in the office, and the roll not being then brought in, signed judgment of *non pros* the next day at twelve. This practice *Baldwin* contended was regular.

Shepherd, contra. As in fact the judgment was not signed till after the roll was actually brought in the next morning, on the 15th, it was then irregular to sign judgment *without making another search*. He contended, that this was not like a case where a party puts himself in contempt; as, for instance, where an attachment is moved against him; because there the person, moving for such attachment being once intitled to it, does not waive his right, by omitting to take advantage of it on the very day. But it is like the case of a plea, where if it be not put in on the day the rule expires, and the other party does not take advantage of it immediately, the defendant may deliver his plea any time before judgment is actually signed against him: and

The Court was of that opinion. And it ap-

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pearing that the plaintiff's attorney had told the defendant's attorney of the irregularity, and had desired the matter might be rectified, without its being brought before the Court, but that he had refused, the Court made the Rule absolute with costs.

Sproat v. Matthews, 26 G. 3. B. R. Durnford and East, 1 V. 182.

Where a bill of exchange was drawn upon A. residing in London by a consigner of goods living abroad; on it being presented for acceptance, A, said, he could not then accept, because he did not know, whether the ship would arrive at London or Bristol. B. the holder of the bill, agreed to leave it for some time, reserving the liberty of protesting it, for non-acceptance, in case A. did not accept. On a second application, A. said the bill would be paid even if the ship were lost. This is only a conditional acceptance, depending on two events, of the ship's arriving at London, or being lost. And B. having the liberty of re-

Upon shewing cause why the nonsuit entered in this case should not be set aside and a new trial granted, the facts, as they appeared by the report, were as follow: This was an action by an indorsee of a bill of exchange against the acceptor. The bill was drawn on defendant, and was made payable forty days after sight to one *Lenox* or order. *Allen*, the plaintiff's clerk, swore that on the 24th of *September* 1785, he presented the bill to the defendant who lived in *London*, for acceptance, who told him "that the drawer had consigned "a ship and cargo to him and another person "at *Bristol*, but as he could not then tell "whether the ship would arrive at *London* or "*Bristol*, he could not accept at that time;" upon which *Allen* said, that he would leave the bill upon this condition, that in the event of the defendant's not accepting it from the day when it was presented, he should be at liberty to note it for non-acceptance as from that time. To this the defendant assented, and the bill was accordingly left at his house, 'till the 8th of *October*, when *Allen* called again, in company with the plaintiff, to know whether the defendant would accept the bill or not, who on being pressed to accept, said "the "bill was a good one, and *that it would be* "*paid, even if the ship were lost.*" *Allen* immediately upon this, carried the bill to a notary public, and had it noted for non-accept

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fusing such conditional acceptance, precludes himself from recovering against A. by afterwards noting the bill for non-acceptance. Whether a conditional or an absolute acceptance, is a question of law.

ance from the time when it was first left with the defendant. The ship afterwards arrived safe at the port of *London*, and the cargo was disposed of. by the defendant.

Buller, J.—who tried this cause at the last sittings at *Guildhall*, being of opinion that this amounted only to a *conditional acceptance*, which the plaintiff was at liberty to refuse or not as he chose, and that his noting the bill immediately after the second conversation, shewed that he was not satisfied with such conditional acceptance, nonsuited the plaintiff.

This motion had been made on two grounds;

1st. That this must be considered as an absolute acceptance.

2dly. That even if it were a conditional one, it should have been left to the Jury to consider whether the plaintiff had precluded himself by his subsequent conduct from recovering against the acceptor.

Wilson and *Baldwin*, against the rule, contended that this was only a conditional acceptance; and it was clear that it was so understood by the parties at the time; for if the plaintiff had considered it as an absolute acceptance, he would not have protested it immediately for non-acceptance. No person could explain the conversation which took place between the parties so well as themselves; and the acts of the plaintiff prove what an impression it made on him. After the plaintiff had protested the bill for non-acceptance, he ought not to be permitted to say, he was satisfied with the acceptance. It is conclusive against him; for by noting the bill for non-acceptance, he gave up the defendant altogether. Then it ought not to have been left to the

the Jury to consider whether the parties had misunderstood the conversation.

Erskine and *Wood*, *contra*, insisted that the second conversation alone amounted to an absolute acceptance; if so, nothing which the plaintiff did could be a waiver of it. The words "*even if the ship were lost*," can only admit of one grammatical construction. It is taking for granted that the bill would be paid, if the ship arrived safe; and these words import, that it would be paid at all events, whether the ship was lost or not.

Then taking the second conversation as explanatory of the first, it proved that the defendant only doubted at first on the event of the ship's arrival at *London*; but that doubt was put out of the question, by the subsequent conversation, when he said he would accept at any rate, even if the ship were lost; that is, even if that event should take place which he apprehended and doubted at first.

But supposing the acceptance to be conditional, the event, on which the defendant was to accept, having happened by the arrival of the ship at *London*, the only point to be considered was, whether the plaintiff had precluded himself by his subsequent conduct, in noting the bill, from having recourse to the defendant. This might be reconciled from considering the purport of the bill, which was payable forty days *after sight*. The *noting* of the bill *was not* for the purpose of protesting it for non-acceptance, but only in order to ascertain the time when it was presented for acceptance. At all events, if there was any ambiguity in the transaction, either respecting the acceptance, or the waiver of it, it should have been left to the Jury to consider, whether, un-

der all the circumſtances, the plaintiff had precluded himſelf from recovering on this acceptance.

Lord MANSFIELD, *Ch. J.*—was abſent on this day, and continued abſent during the reſt of the term.

WILLES, *J.*—Whether this nonſuit was right or not, depends on two queſtions.

1ſt. Whether this was an abſolute, or a conditional acceptance? in determining which, we muſt conſider the two converſations between *Allen* and the defendant together. When the bill was firſt preſented to the defendant for acceptance, he ſaid, he could not accept at that time, becauſe he did not know, whether the ſhip would come to *London* or not. The reaſon of this anſwer is obvious, becauſe if the ſhip arrived at *Briſtol*, ſhe was conſigned to another perſon. Then, in a ſubſequent converſation, he ſaid, "the bill will be paid, "even if the ſhip be loſt." So that he accepted on two conditions; namely, the *one*, if the ſhip came to *London*, in which caſe he would be enabled to pay himſelf with the profits of the cargo; *the other*, in caſe the ſhip was loſt, when he would have wherewithal to ſatisfy the bill, he having a policy of inſurance on the ſhip in his hands: but he did not accept in the third inſtance, which was in the event of the ſhip's going to *Briſtol*.

The Court has not of late been very nice with regard to what ſhall be conſtrued to be an acceptance; for though, formerly, it was held neceſſary, that an acceptance ſhould be in writing, yet of late years, a parol acceptance has been deemed ſufficient. And indeed, at preſent, almoſt any thing amounts to an acceptance. Therefore, if there were a doubt, whether

whether this was a conditional or an abſolute acceptance, or whether (admitting it to be a conditional one only) the party had precluded himſelf by his ſubſequent conduct, the whole of the facts ſhould have been left to the Jury. So that I am of opinion that the nonſuit ought to be ſet aſide.

ASHHURST, *J.*—I do not concur with my brother *Willes*, that this nonſuit ought to be ſet aſide. In the caſe of a written acceptance, the acceptance ſpeaks for itſelf: but this being a parol acceptance, the conduct of the plaintiff is deciſive againſt him. And the *evidentia rei* ſhews that he put the right conſtruction on this tranſaction, by procuring the bill to be noted. On the firſt converſation, the defendant expreſſed a doubt, whether the ſhip would come to *London*, or to *Briſtol*; if to *London*, he would have had effects in his hands to indemnify himſelf, becauſe the cargo was conſigned to him; if to *Briſtol*, it was conſigned to another perſon. Then it was agreed between the parties, that the bill ſhould be left with the defendant, with liberty to the plaintiff to note it, as from the firſt tender of the bill, in caſe the defendant ſhould not eventually accept. On the ſecond converſation, the defendant is repreſented to have ſaid, "the bill "will be paid, even if the ſhip be loſt." The witneſs might have varied this phraſe.

But at all events, this only amounted to a conditional acceptance, in caſe the ſhip arrived at *London*, or was loſt; which the plaintiff afterwards waived. If the party had conceived it to be an acceptance, he ſhould have required that to be ſignified on the bill itſelf: then it was ſaid that the reaſon why the bill was noted, was to mark the time from which

it was to be confidered as accepted; but that might have been better effected on the bill, by accepting it as from that day. Then it is manifeft that the parties underftood at the time, that the matter was left unconcluded. If fo, the plaintiff is abfolutely bound by his fubfequent act; for he protefted the bill for non-acceptance; therefore, there could be nothing to leave to a jury.

Buller, J.—We are now to determine on a point of law, which is decifive that this queftion ought not to have been left to the Jury. Whatever may have been the doubts formerly of what amounted to an acceptance, I conceive it is the fole province of the Court to decide, whether this is an abfolute or a conditional acceptance. This cafe was proved by one witnefs, on the part of the plaintiff; the defendant's counfel admitted this evidence to be true; but infifted that upon that evidence, the defendant was not liable in point of law. Then there was nothing to be left to the Jury. If the defendant had objected at the trial that the plaintiff's witnefs might be miftaken in his expreffions, that might properly have been left to the Jury, who are to decide on the credit or accuracy of a witnefs. Then, fuppofing thefe facts had been ftated on a fpecial verdict, the Court would have been bound to determine whether this, in point of law, was an acceptance or not. And this brings it to the true queftion before us, namely, whether this is a conditional or an abfolute acceptance? There is no ground for faying it was an abfolute one. It was not thought of at the trial; and the words of the defendant preclude every idea of it. Taking both the converfations together, it is decifive againft the plaintiff. At

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the firſt converſation the defendant ſaid, I do not know whether the ſhip will come to *London*, and therefore I cannot accept at preſent. At that time then, he only intended to accept in the event of the ſhip's coming to *London*; at the ſecond he ſaid, "the bill will be paid, "even if the ſhip be loſt;" both the converſations therefore amount to this, that there were two events in which the bill would be paid, the one, if the ſhip came to *London*; the other, if ſhe were loſt. It is evident from what paſſed, that the defendant did not intend to accept, unleſs he had wherewithal in his hands to reimburſe himſelf. If the ſhip came to *London*, he had the diſpoſal of the cargo; if ſhe were loſt, he was in poſſeſſion of the policy. This, therefore, was a conditional acceptance; and in theſe caſes the holder may chooſe whether he will be ſatisfied with it or not: but here the plaintiff has waived it, by proteſting the bill for non-acceptance. And his reaſon for noting it for non-acceptance, as from the firſt day, was, that he might proceed againſt the drawer for intereſt for a longer time.

Rule diſcharged.

Caſe for goods ſold and delivered.

Alexander v. Owen, E. 26 G. 3. B. R. Durnford and Eaſt. 1 V. 225.

Where goods are delivered under an agreement to take a ſpecific parcel of copper money in payment; a delivery of ſuch copper will be a good bar to an action for the value of the

Pleas the general iſſue, and a ſet-off.

The cauſe was tried at the laſt aſſizes at *Lancaſter*, before *Willes*, Juſtice, when the plaintiff was nonſuited.

On a motion to ſet aſide the nonſuit, it appeared, that the plaintiff had bargained to ſell to the defendant, who lived at *Mancheſter*, a quantity of tobacco, the value of which, in addition to a former debt of £. 23. for ſome other tobacco, amounted to £. 50. It was

 agreed

goods, though in fact it was counterfeit money. An illegal contract if rescinded as to part, must be rescinded in toto.

agreed at the same time between the parties, that the plaintiff should take in payment of that debt, a quantity of copper halfpence, which were made up in crown papers, in each of which was no more than five pennyworth of good halfpence; and it was also agreed, that if the amount of the copper should exceed the value of the tobacco, some more of the latter should be sent to balance the amount. Part of the tobacco was delivered, but the plaintiff refused to send the remainder, unless the defendant would pay for the whole in good money. Several samples of this copper were shewn to the plaintiff at the time of the agreement, who said it would pass very well at *Liverpool*, where he lived. The copper was accordingly sent to the plaintiff, on the 19th of *July*, and on the 30th of *August* the defendant wrote a letter to the plaintiff, refusing to take it back, in answer to a letter of his of the 28th of the same month, complaining of the badness of it, and refusing to accept it. It also appeared, that before the writing of this letter, the parties had corresponded on the subject: but the copper was not actually returned till *November*.

The question was, Whether the delivery of the copper was a good payment? If so, there was more than enough to balance the plaintiff's demand. *Bolton*, Serjeant, against the rule, insisted that this was not a contract for the purpose of uttering bad money, which would have been illegal, and therefore void under the stat. 15 *Geo.* 2. *c.* 28, but it was an agreement by the plaintiff to take a specific parcel of copper, which was valid and legal. But supposing it otherwise, the plaintiff was equally culpable with the defendant, and as it appeared

appeared that he had ſeen the identical copper at the time of entering into the agreement, he ought not to be permitted to object to it now, as an illegal contract.

Scott and *Haywood, contra*, contended that this agreement was void, becauſe it was an agreement to commit an offence; and thereſore the defendant could not protect himſelf under it, for, independant of the ſtatute of the 15 *Geo.* 2. it was a miſdemeanor to utter counterfeit money knowing it to be ſuch.

But ſuppoſing the plaintiff would have been bound by the agreement, if it had been concluded; yet it was only executory, for the plaintiff ſent word that he would not take the copper money as payment; and he kept back part of the tobacco which had been agreed for. If an action had been brought by the defendant to compel the delivery of the reſt of the tobacco, he could not have recovered, becauſe there was no legal conſideration: and if the defendant had never ſent this copper in payment, the plaintiff could not have compelled him to perform the contract, which would have ſubjected him to a criminal proceſs. Then he ought not to be permitted to take advantage of it in this ſhape.

This queſtion ſhould have been left to the Jury, to determine the extent of the agreement; and at leaſt the plaintiff was entitled to recover that part of his debt which accrued previous to this contract.

It has been ſettled, that if a contract is valid as to part, and void as to the reſt, the plaintiff may recover upon that part of it which is legal. *Robinſon* v. *Bland*, 2 *Burr*. 1077.

Willes, *J.* declared himſelf ſatisfied with the nonſuit.

ASHHURST, *J.*—The nonſuit in this caſe ought to ſtand; for it does not appear that the parties entered into this contract, knowing it to be illegal: but even if it were ſo, it does not lie in the plaintiff's mouth to take advantage of it.

BULLER, *J.*—It has been objected that this is an illegal contract: there is no doubt but that an agreement to take counterfeit money, knowing it to be ſo, is void; but the fact does not come up to it in this caſe. The plaintiff did not agree to take counterfeit money in payment, but the agreement was to take ſuch copper money as was then ſhewn to him.

Suppoſing, however, that this contract was illegal, the plaintiff would not ſtand in a better ſituation. He could never recover; for the argument of the plaintiff's counſel, in caſe an action had been brought by the defendant to recover the remainder of the tobacco, would have been equally applicable to the plaintiff. It cannot be ſaid that the ſale is good, and that the payment is bad; if it is an illegal contract, it is equally bad for the whole. It would be great injuſtice to allow the plaintiff to recover in this action the whole value of the goods ſold, becauſe that would be permitting him to take advantage of a corrupt agreement, which is never allowed in caſes where a party applies to the Court to ſet aſide ſuch agreements.

That was the principle on which the Court went in a late caſe of *Fitzroy* and *Gwillim* (a), where they ſaid, that, if a party applies to the Court to reſcind a contract on the ground of its illegality, it muſt be done in *toto*, and he muſt not derive any advantage under it. The parties are in *pari delicto*, and if one of them ſeek relief,

(a) Durnford and Eaſt, 1 V. 154.

relief, he muſt firſt do what is juſt; according to the principle eſtabliſhed on the other ſide of the hall, that he who aſks equity muſt do equity.

This nonſuit will not preclude the plaintiff from recovering the £. 23, which was owing upon a former agreement, becauſe that debt aroſe from a fair and valid tranſaction: but that is no reaſon for ſetting aſide the nonſuit in this caſe.

Rule diſcharged.

King v. Pippet, E. 26 G. 3. B. R. Durnford and Eaſt, 1 V. 235.

In an action for bribery at an election where the declaration ſet forth the precept from the ſheriff to the portreeve of a borough, the improper inſertion of the word "if," in ſuch precept is not a fatal variance, but it will be rejected as ſurpluſage.

Debt for two penalties of £. 500 each, under the ſtatute of the 2 *Geo.* 2. *c.* 24. for preventing bribery at elections.

This was tried at the laſt aſſizes for the county of *Devon*, before *Eyre*, Baron, when the plaintiff was nonſuited upon the ground that there was a variance between the precept ſtated in the declaration, and the one which was proved.

The declaration recited the writ to the ſheriff for the election of members to ſerve in parliament, and then proceeded to ſtate, that the ſheriff *made his precept* to the portreeve of the borough of *Honiton*, which concluded in theſe words, "and *if* the ſaid election ſo made, "diſtinctly, and openly, under the ſeal of the "portreeve, and the ſeals of thoſe who ſhould "be preſent at ſuch election, the ſaid por- "treeve ſhould certify to the ſaid ſheriff, ſo "that the ſaid ſheriff ſhould certify to his ſaid "majeſty, in his ſaid majeſty's chancery, at "the day and place aforeſaid, without delay; "remitting to the ſaid ſheriff one part of the "aforeſaid indentures, ſo that the ſaid ſheriff "might remit the ſame to his ſaid majeſty, "annexed to his majeſty's writ." The precept when produced, had not the word "*if*,"

which

which the Judge thought did not ſupport the declaration.

Gibbs ſhewed cauſe againſt a rule which had been obtained to ſet aſide this nonſuit.

The precept ſtated in the declaration, is not proved by the real one, which has a perfect concluſion inaſmuch as it contains a poſitive direction to the portreeve to proceed to election, and return the precept; whereas that ſet out in the declaration has an imperfect and conditional concluſion.

(a) Dougl. 642.

The principle laid down in the caſe of *Briſtow* and *Wright* (a) decides, that this is a legal objection. That was an action againſt the ſheriff, for taking goods without leaving a year's rent. In the declaration, the particulars of the demiſe were ſet forth, which was held to be unneceſſary; but the plaintiff, having undertaken to do it, and not proving them as ſet forth, was nonſuited. It was ſaid by Lord *Mansfield* in that caſe, that "the diſtinction is "between that which may be rejected, as ſur-"pluſage, (which might have been ſtruck "out on motion) and what cannot. Where "the declaration contains impertinent matter, "that will be rejected by the Court, and need "not be proved; but if the very ground of "the action be miſtated, as where you under-"take to recite that part of the deed on which "the action is founded, and it is miſrecited, "that will be fatal; for then the caſe declared "on, is different from that which is proved, "and you muſt recover *ſecundum allegata et* "*probata*." The queſtion then is, whether the ſetting out this precept be impertinent or immaterial? if the former, the variance in the declaration is not fatal, becauſe in ſuch caſe, it is not neceſſary to prove the precept; but

if

if immaterial only, as the plaintiff has undertaken to ſet out that which he need not have done, he is bound to prove it as ſtated. Here perhaps it might have been ſufficient to have ſtated that there had been an election, and that at ſuch election the bribery had been committed; but the plaintiff having undertaken to ſet out this precept, is bound to prove it as ſet forth, becauſe he makes out his caſe through it.

If the inſertion of the word "if" makes any alteration in the ſenſe, it is a ſufficient objection; and it is clear in this caſe, that it alters the ſignification of every ſubſequent word, by making that conditional which ought to be poſitive: therefore every word which follows "*if*," in the declaration, muſt be taken in a different ſenſe from that in which they are to be underſtood in the precept. It is not enough to ſay, that by the rejection of the word "*if*" the ſenſe will be complete, for any perſon reading this record, would rather ſuppoſe that ſomething had been omitted in the concluſion, than that the word "*if*," had been improperly inſerted in this part.

Lawrence and *Watſon contra* argued, that the declaration did not affect to ſet out the *tenor* of the precept, in which caſe the variance would have been fatal; but it only ſtated that the ſheriff had made his precept, by which he had given certain directions to the portreeve.

The Court may not only read the declaration without the word "*if*," but even without any part of the precept in which it is contained, becauſe it was not neceſſary to be ſet forth. In the caſe of the *King* and *Beach* (a), *undertood* was written for *underſtood*, in the aſ- (a) Cowp. 229.

ſignment

ſignment of perjury, which was held not to be a fatal variance. If then the Court can ſupply a letter in order to make ſenſe, they may alſo reject a word for the ſame purpoſe. For the introduction of the word "*if*" makes the whole ſentence unintelligible.

In the caſe of *Briſtow* and *Wright*, the whole of the contract was neceſſary to be proved, and conſequently the *time* when the rent was payable; but here the matter ſtated was perfectly unneceſſary. The mode of election, and the return by the portreeve to the ſheriff, were irrevelant to this action, and therefore they may be rejected as ſurpluſage, according to what was ſaid by the Court in *Briſtow* and *Wright*, with reſpect to irrelevant covenants in a leaſe.

(b) Dougl. 183. The *King* and *May* (b) was an indictment for perjury, committed on the trial of an indictment for an aſſault, in which were theſe words, "whereby his life was greatly *deſpaired* "of." This laſt indictment was ſet out in the former, omitting the word "*deſpaired*;" this was *ſupplied* by the Court, upon the ground that the omiſſion of that word made it nonſenſe; the ſame reaſon therefore holds for *rejecting* this word.

They then cited *Wilſon* againſt *Mawſon*, at the ſittings after *Michaelmas* term, 13 *Geo.* 2. at *Weſtminſter*. That was an action for falſe impriſonment, and the bill of *Middleſex*, upon which the party had been arreſted, was ſet forth in the declaration as follows: that the ſheriff was commanded to take A. B. (the then defendant) and *John Doe*, if, &c. and them, &c. ſo that he might have their bodies before our Lord the King, at *Weſtminſter*, on, &c. (*verbatim* to the end.) The bill of *Mid-*

dlesex being read, was in these words: the sheriff is commanded to take *A. B.* and *John Doe, if they shall be found in his bailiwick, and them safely keep,* so that he may have their bodies before, &c. it was insisted by the defendant's counsel, that this was a variance, between the bill of *Middlesex*, and the record, and that it was not sufficiently set out, on account of the words, &c. *Sed per Lee,* C. J. the objection is, that all the bill of *Middlesex* is not set out in the record, but there is no occasion to set it all out. The substance is sufficient, and there is no variance between the bill of *Middlesex*, and so much of it as is set out in the record.

So also the case of *Hendray* against *Spencer* (a), which was an action brought by the high bailiff of *Westminster*, against the defendant, in the nature of an escape. The declaration stated a *latitat* against *Donner* and *J. Doe*, with an *acetiam* against *Donner*, for £. 30. That a warrant was made to the high bailiff, &c. and that the plaintiff (the high bailiff) arrested *Donner*, and delivered him to the defendant, who promised safely to keep him, but afterwards permitted him to escape, by which means the plaintiff was obliged to pay the money. The writ produced in evidence, was against *Donner* and two others, and not against *J. Doe*. Mr. *Mansfield*, on behalf of the defendant objected that this writ did not prove the declaration, but was a variance; for a writ against *Donner* and two others, could not be the same as a writ against *Donner* and *J. Doe*. *Wallace contra*, said, the only question was, whether such a writ issued, as warranted the arrest of *Donner*, and that had been proved. Lord *Mansfield* over-ruled this objection, and said,

(a) Sittings at Westm. after Mic. 1773.

faid, this was a fufficient writ to warrant the arreft, and that was all that was neceffary.—Plaintiff had a verdict.

Willes, *J.*—I am of opinion, that this nonfuit ought to be fet afide. It is agreed that the whole precept need not have been fet out; fo that ftating it was furplufage. It is likewife agreed, that the precept is not fet out according to its *tenor*. But it is objected that the laft claufe of the precept is fet out as conditional, inftead of its being a pofitive averment. If it were fo, the argument would have fome weight: but I do not think the infertion of the word "if" varies the fenfe of the fentence; but, if it has any effect, it makes nonfenfe of a precept, which ought not to have been fet out at all, therefore the Court is bound to reject fuch a word. The cafe of the
(b) Cowp. 229. *King* and *Beach* (b) applies very ftrongly; there the omiffion of the letter "s," did not change the fenfe; neither in the prefent cafe does the addition of the word "if," convey a different meaning. If this word be rejected, the fenfe is complete; and I think we are warranted in rejecting it by the cafe of *Hendray* v. *Spencer*, where though there was a variance in the names of the two perfons in the writ, yet enough of it was fet forth to warrant the arreft.

This is totally different from the cafe of *Briftow* v. *Wright*. There the demife was particularly fet forth, which varied materially from the demife as proved; therefore the fenfe itfelf was different.

Ashhurst, *J.*—I think the Court may, and ought to reject the word "if," as furplufage; for on reading the record, we fee that the word introduced is nonfenfical. The

Court

Court is bound to judge according to certain and known rules of law, and they must take notice, *ex officio*, of what is the form of the precept. It is a matter of notoriety, and looking on the record, we see the word "if," inserted, which is contrary to the form of the precept. Therefore, this is not like a matter in *pais*, which the Court can know nothing of 'till it comes before them.

This case does not appear so strong as those of *Hendray* v. *Spencer*, and *Wilson* v. *Mawson*; for the addition of a name was a thing which the Court could not possibly know 'till the production of the writ at the trial: but this is what they must, on reading, know to be wrong. Therefore I am of opinion, that the nonsuit ought to be set aside.

Buller, *J.*—The declaration in this case is much longer than it need have been. There was no necessity to set out the precept, but, being set forth, the question is, whether the variance is or is not material? I think it is impossible for any person to read this part of the declaration, without knowing what it should be: every one must see by it, that the portreeve *is absolutely to certify to the* sheriff, *&c.* The insertion of the word "if," is a mere mistake. The case of the *King* v. *Beach*, is much stronger than the present. There, the Court supplied a letter to make up a word, which was necessary in setting out an indictment: but here, it was not necessary to state the precept at all. But it does not rest here only: there are other cases equally strong, as *Hendray* v. *Spencer*, and *Cuming* v. *Sibly*, *E.* 9 *Geo.* 3. *C. B.* which was an action for bribery: there the declaration stated the precept to be directed to the *mayor only*; but the precept which was proved, was directed to the

Mayor and Burgesses; and the only question in the case which was reserved for the opinion of the Court, was, whether the precept that was proved, supported the declaration? The Court of Common Pleas was of opinion, that it did, and gave judgment for the plaintiff. In that case, there was a variance in the person to whom the precept was directed; but the Court was of opinion, that if it were the same in substance as that which was set forth in the record, it was sufficient, unless the *tenor* was stated. So in this case, the variance, to have any effect, must be a variance of sense, and of something material.

(a) Dougl. 643. (b) Dougl. 640. (c) Dougl. 695. Vide post N°. (19.)

The three principal cases which have been argued in this Court of late years, are, *Shute v. Hornsey* (a), *Bristow v. Wright* (b), and *Grant v. Astle* (c), all of which were upon contracts. In these kind of cases, it is necessary to set out the contract in the declaration; and if it be different in any part, the whole foundation of the action fails, because the contract is entire.

(d) Trin. 7 Geo. 3. B. R.

In the case of the *King* v. *Lookup* (d), which was an indictment for perjury; the objection was, that the indictment stated the bill in Chancery, to be directed to "*Robert Lord* "*Henley*, &c." whereas it was directed to "Sir *Robert Henley*, Knight, &c." But that objection was over-ruled.

(e) 2 Stra. 1155.

The case of *Shuttleworth* v. *Pilkington* (e), is likewise extremely strong. That was an action on a bail bond. The special original was returnable, *coram domino rege ubicunque tunc fuerit in Angliâ*: but the word "ubicunque," was omitted in the bail bond: and it was objected, that by the statute of *Hen.* 6. (which was pleaded) the sheriff could take no bond, but

but ſuch as correſponded with the writ; whereas this might be to compel an appearance out of *England*, if the king ſhould happen to be ſo. But the Court ſaid it was ſufficient in theſe bonds, to ſtate in *ſubſtance*, the deſign of the writ; and that they would underſtand, that by appearing before the king, was meant before the *king in his court*, and not before the *king in perſon*. And the plaintiff had judgment.

In the preſent caſe, the ſenſe of the precept as ſtated in the declaration, is the ſame as that which was proved: it commands the returning officer to proceed to an election. Therefore as this is not a variance in ſenſe; I am of opinion, that the nonſuit ſhould be ſet aſide.

Rule abſolute.

Kulen, Kemp and others againſt Vigne, T. 26 G. 3. B. R. Durnford and Eaſt, 1 V. 304.

Money having been expended in reclaiming a cargo on board a ſhip captured, was inſured by the owners upon the event of the ſhip's arrival at Marſeilles. The ſhip being captured and reſtored upon appeal, relinquiſhed her voyage, and was afterwards loſt. Pending the appeal, the goods were ordered to be ſold, and the expences of the appeal were afterwards defrayed therewith, yet an

This was an action on a policy of inſurance, which came on to be tried at the ſittings after laſt *Eaſter* term, at *Guildhall*, before *Buller*, *J.* —who nonſuited the plaintiff.

Upon a motion to ſet aſide that nonſuit, the following facts were reported, That the inſurance was upon goods on board the ſhip *Emanuel*, at and from *Falmouth* to *Marſeilles*, warranted a *Daniſh* ſhip; and on the policy was this *memorandum*; "The following inſurance is declared to be on money expended for reclaiming the ſhip and cargo valued at the ſum which ſhall be declared hereafter. The loſs to be paid in caſe the *ſhip* does not arrive at *Marſeilles*, and without farther proof of intereſt than this policy; warranted free from all average, and without the benefit of ſalvage."

It appeared that the plaintiffs were proprietors of the *cargo*, but not of the *ſhip*. That the ſhip originally ſailed with the cargo on

 board

averment of a lofs by capture is bad, becaufe the fhip might notwithftanding the capture have afterwards arrived at Marfeilles: and this being a wagering policy, the affured could not at any time abandon.

board from *Riga* on a voyage to *Marfeilles*, and that an infurance had been effected at *Bremen* upon the cargo for that voyage; in the courfe of which fhe was taken, and brought into *Falmouth*, by an *Englifh privateer*. That fentence of condemnation had been there obtained, which was afterwards reverfed upon the prize having been proved to be a neutral fhip, but the expences of procuring that reverfal were ordered by the admiralty court to be a charge upon the cargo. The plaintiff's agents accordingly paid the fum of £. 1031. 14*s*. for the expences of reclaiming the fhip and cargo; and immediately procured the policy in queftion to be effected in *January* 1781, according to the purport of the *memorandum*. In the *February* following the fhip fet fail from *Falmouth* with the original cargo on board, in the profecution of her voyage to *Marfeilles*; but on the 26th of the fame month, before her arrival there, was captured by a *Spanifh* fhip, and carried into *Ceuta* in *Spain*, where fhe was again condemned.

An appeal was brought in the fuperior court of *Madrid*, which promifing to be of long continuance, the cargo, which was of a perifhable nature, was ordered to be fold, and the proceeds to be brought into court, to wait the event of the fuit. In *May* 1783, the veffel was reftored by fentence of the court, and the furplus of the proceeds which arofe from the fale of the cargo, was paid to the owners, deducting the expences incurred in *Spain* in profecuting the appeal. After all the charges paid, there only remained twenty-fix rix-dollars. As foon as the fhip was liberated, fhe failed from *Ceuta* to *Malaga*, in order to refit, and having there made the ne-

ceffary

ceſſary repairs, ſet ſail for *Bremen*, and in that voyage was loſt.

The inſurance made upon the cargo at *Bremen* has been paid. The declaration averred, that "*whilſt the ſhip was proceeding in*
" *her ſaid voyage from* FALMOUTH *to* MAR-
" SEILLES, *and before ſhe could arrive* at MAR-
" SEILLES, ſhe was captured by the SPA-
" NIARDS, and thereby the ſaid ſhip, and alſo
" the goods and merchandizes on board her,
" were totally loſt to the plaintiffs."

Buller, J.—then proceeded to obſerve, that at the trial, it was objected on the part of the defendant; 1ſt. That this was not an inſurable intereſt; and, 2dly. That the plaintiffs could not recover upon the policy in this form of declaring, for they had ſtated the loſs to have happened by *capture*; whereas, though the veſſel was captured, yet, having been afterwards reſtored, ſhe might have reached her deſtined port notwithſtanding the capture, in which caſe the underwriters would have been diſcharged by the terms of the memorandum. And that he, being of that opinion, had nonſuited the plaintiffs.

Erſkine and *Adam* ſhewed cauſe, and contended that the nonſuit ought to ſtand, as well upon the merits, as upon the validity of the objection, which had been taken in point of form. It is material in the firſt inſtance for the Court to conſider how far the averment made by the plaintiffs, that they are intereſted in the premiſes, is well founded in point of law; for if it appears that the under-writers at *Bremen* were anſwerable for the expences which had been incurred in reclaiming the goods, in that point of view the preſent contract would amount to a re-aſſurance, and was conſequently

 void.

void. Then as to the event insured, which is the arrival of the *ship* at *Marseilles*; in order to entitle the plaintiffs to recover upon an averment of a loss by capture, they should have proved that the ship did not arrive there in consequence of the *capture*. But notwithstanding that event, the ship might afterwards have reached her port of destination.

This policy is essentially defective and nugatory; for the subject matter of the insurance is entirely unconnected with the event which is insured against, the plaintiff not having insured against any event by which he might be deprived of his property. And whether the ship and cargo arrived or not at *Marseilles* was perfectly immaterial; for, if the ship and cargo arrived, the plaintiffs could not have been reimbursed the expences which they had been put to; the cargo would still only have been worth its original value; and if it did not arrive there, the under-writers at *Bremen* would have been liable. So that it would have made no difference as to the real interest of the plaintiffs, whether this insurance had been made upon the arrival of any other ship; and it is in the nature of a wager.

To entitle the plaintiffs to recover, it was incumbent on them at the trial to have shewn two things; 1st. That the vessel used her utmost endeavours to get to *Marseilles*; and for this purpose it must be taken that the plaintiffs had a right to order the destination of the vessel. 2dly. That she was prevented from arriving there by some peril insured against. The event insured against here, was the non-arrival of the ship at *Marseilles*, and there is an averment that the ship was captured. If this had been a policy upon interest, the averment that

that the ship was captured would have been good; for in such case, wherever the voyage is interrupted or defeated, the party interested may abandon; but it is otherwise upon a wagering policy; there being nothing to abandon, as the subject matter of the insurance in question is incapable of abandonment; and this distinction was taken in *Fitzgerald* and *Pole* (a). Here then the plaintiffs have entered into two inconsistent contracts. As against the under-writers at *Bremen*, the plaintiffs were entitled to abandon upon the first of these contracts, and recover as for a total loss; for such a policy is an indemnity against a particular event by which a loss or damage may accrue to the thing insured: but with regard to the present contract, the event insured being the arrival of the ship at *Marseilles*, the plaintiffs could not abandon, but were bound to use their best endeavours to send the ship thither. For, if by any act of the assured, as by abandonment, it was rendered unnecessary for the ship to proceed to *Marseilles*, and in consequence, she steered a different course, the under-writer was instantly discharged. Therefore, the very act of abandonment, which enabled the plaintiffs to call upon the under-writers at *Bremen*, precludes them from maintaining their present demand.

(a) 5 Brow. App. 137.

Piggot and *Baldwin*, *contra*, argued from the clear intention of the parties, that the only object of the insured, in procuring the policy in question to be effected, was to indemnify themselves against the expences which they had been put to in reclaiming the cargo. They had acted *bonâ fide*, and laid all the information which they were in possession of before the under-writers. This demand is declared

to be for money actually expended upon the goods, and therefore the increase is only to be considered as an increase of the original value of the cargo, and as if it had been under-insured at first; in which case it would certainly have been competent to them to have covered the whole of their interest by a fresh insurance.

Although by the terms of the *memorandum* on the policy, the event insured was the arrival of the *ship* at *Marseilles*, and *not* of the *cargo*; yet that must necessarily be confined to her arrival in *that voyage*. It could never have been the meaning of the parties that the assurers were to be discharged, if the ship arrived at *Marseilles* at any distance of time; every contract of this nature is obviously confined to the voyage intended. But if the object of the voyage was defeated, by any peril in the course of it, the continuation of it became nugatory, and the assured having in consequence abandoned that voyage, and afterwards steered a different course, cannot be considered as amounting to a deviation, for the purpose of discharging the under-writers; for the moment that the voyage was defeated, that event happened upon which they were liable. The subsequent sentence for restoring the ship and cargo will not vary the question. When the vessel was taken and carried into *Ceuta*, it was impossible to foresee what expences would be incurred, and the cargo being of a perishable nature, it was thought most for the advantage of all parties to dispose of it; this being accordingly done, a total end was put to the voyage, and from that moment the defendant was fixed. What afterwards became of the ship, was perfectly im-

 material

material to these parties. The sale therefore of the cargo, being the unavoidable consequence of the capture, must have relation back to its original cause; and then the averment in the declaration is true and proper.

Lord MANSFIELD, *Ch. J.*—The interest on which the plaintiff effected this policy, was money laid out in reclaiming the *cargo.* The event insured by the policy, was the arrival of the *ship* at *Marseilles*. If *she* did not arrive, then the money was to be paid; if *she* did, there was an end of the insurance; a loss accrued upon the cargo in the voyage; the under-writer is sued, and the loss is averred in the declaration to be *by capture.* The fact of the case is, that the ship was taken by a *Spanish* privateer, but was afterwards restored, and in a condition to pursue her voyage, and was afterwards lost in another voyage.

The answers to this case are decisive.

First, this is a wagering policy, and it is just the same, as if the event insured, had been the arrival of any other ship at *Marseilles*. The loss or safe arrival of the ship did not alter the security. The parties were interested in the *cargo alone*, but the event insured, was the arrival of the *ship* and *not* of the *cargo.* A necessary consequence of this being a wagering policy, is, that the insured cannot abandon. But, even supposing it to be a policy on interest, it is enough to say, that in this case, the parties never did abandon. In effect, there was only a temporary capture, and though by construction, a temporary capture is such a loss, as that an assured upon interest is warranted in abandoning at the time, if he pleases, yet we must consider what the truth of the

case was, between these parties; now this was a wagering policy, and in such case, there can be no abandonment.

But what alone is a fatal objection to the plaintiff's claim is, that they did not attempt to pursue the voyage to *Marseilles*, which it was in their power to do, after they left *Ceuta*. The circumstance of the ship's having been captured and detained for a time, did not prevent her from prosecuting her voyage after she was liberated. Nor is it any excuse, that the plaintiffs could no longer control her destination; for in wagering policies the assured take upon them to perform all that the owners themselves of the vessel could have done in the same situation.

Therefore in every point of view, the plaintiffs are precluded from recovering.

WILLES, *J.*—I shall confine myself to the formal objection which has been taken, because I have some doubts, whether the plaintiffs had not an insurable interest; for by the sentence of the court of admiralty, the expences of reclaiming were thrown upon the owners of the cargo, by which the price of it was increased; therefore I forbear to give any opinion upon that ground. But on the other grounds it is clear, that the plaintiff cannot recover. In the first place, there was certainly a deviation, for the ship set sail for *Malaga*, instead of proceeding to *Marseilles*. Secondly, the plaintiff has declared for a loss by *capture*; but after the capture, the policy might still have been complied with by the ship's going to *Marseilles*; and therefore the loss cannot be said to have happened by that circumstance.

ASHHURST, *J.*—I am of the same opinion with

with my lord upon both points. In the firſt place, this is to be conſidered as a wagering policy; and in ſuch caſe, the party inſured takes upon himſelf to do every thing which the owners of the ſhip might have done; and they might have directed the ſhip to *Marſeilles*. It is alſo certain, that the party inſuring a ſhip to any place, muſt uſe all due diligence to further her voyage thither, which not having been done in this caſe, upon that ground alſo the nonſuit ought to ſtand.

Buller, *J.*—It would be a ſufficient objection in this caſe, that the loſs is averred to be *by capture*; but as the merits have been gone into, I ſhall give my reaſons for ſupporting the nonſuit upon theſe grounds alſo. Policies of inſurance are of two ſorts, either upon intereſt, or by way of wager. Where it is upon intereſt, it has been ſolemnly determined, that it is merely a contract of indemnity, and therefore ought to be ſo framed, that the party can only recover in caſe of a loſs really ſuſtained, and to the preciſe amount of that loſs. My opinion at the trial was, that the parties had it in view to inſure a real intereſt, and protect themſelves by the policy. But whatever their intentions might have been, the Court is bound to look to the inſtrument, and ſee what they have done; and if they have not expreſſed their intentions upon the policy, the Court cannot help them, and they muſt remain bound by their contract. The circumſtances of this caſe are, that the plaintiffs were owners of the cargo, but were not intereſted in the ſhip. They laid out the money which is the ſubject of the inſurance in reclaiming both after a capture and condemnation; and although they were in no degree intereſted in the

ſhip,

ſhip, yet the event which they inſured, is the ſafe arrival of the ſhip at *Marſeilles.* Theſe parties, therefore, who were intereſted in the cargo alone, did not inſure that, but ſomething elſe with which they had no concern. The goods might all have arrived ſafe, and the ſhip have been loſt; and yet they would have been entitled to recover on this policy as for a total loſs. And on the other hand, if the ſhip had arrived, and the goods had been loſt, they could not have recovered, even though they would have really ſuſtained a damage. The policy is not adapted to the real truth of the caſe. This then is a wagering policy, and that circumſtance alone is deciſive upon the ground of merits. The caſes of wagering policies, and policies upon intereſt, have been confounded in the argument. In the latter caſe, if the voyage be loſt, it is not neceſſary for the aſſured to proceed on with the hulk of the ſhip; for they are at liberty to abandon; but then there muſt be an abandonment in point of fact. Therefore, in this caſe, it is enough to ſay, that even if the parties could have abandoned, they have not done it. The plaintiffs have no ground for maintaining this action, either upon the merits, or upon the formal objection.

Rule diſcharged.

Stocks v. Booth, M. 27 G. 3. B. R. Durnford and Eaſt, 1 V. 428.

Poſſeſſion for above ſixty years, of a pew in a church is not a ſufficient title to maintain an action upon the

Caſe for diſturbing the plaintiff in his pew. The declaration ſtated, that the plaintiff had a right to this pew, without laying it to be appurtenant to a meſſuage in the pariſh.

At the trial of this cauſe before *Buller,* J. at the laſt *York* aſſizes, the plaintiff did not ſet up any claim under a faculty from the biſhop, or ſhew any enjoyment in reſpect of

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any house, but offered evidence of possession for above sixty years, and would have derived a regular title from one *Chapple*, to whom the minister and church-wardens, in the year 1711, gave their consent in writing to build the pew in question.

The learned Judge, being of opinion that this did not entitle the plaintiff to recover, directed a nonsuit, which

Bolton, Serjeant, moved on a former day to set aside on three grounds, 1st. That no faculty was necessary in this case to support the plaintiff's action. 2dly. That, if a faculty were necessary, it might be presumed after such a length of possession. 3dly. This being a possessory action, mere possession was sufficient to maintain *it* against a wrong doer.

case for disturbance in the enjoyment of it: but the plaintiff must prove a prescriptive right, or a faculty, and should claim it in his declaration as appurtenant to a messuage in the parish. A faculty to a man and his heirs is bad.

Chambre now shewed cause, and contended that no title to a pew can be derived but by prescription, or by a faculty.

There is no pretence for the first; for it was stated by the plaintiff's counsel at the trial that the pew was built in 1718.

Neither is any title claimed under a faculty; but, even if there had been one to the person who built the pew, this action could not have been maintained, because that person could not have conveyed his right under that faculty. A faculty is only to the first grantee, and cannot be transferred by him. A faculty to a man and his heirs (a) is not good in point of law; for a seat in the church does not belong to the *person* but to the *house*. This doctrine is recognized in the case of *Langley* v. *Chute* (b), the parishioners, who repair the church and the pews in it, are entitled to seats the church; the power of the ordinary is merely

(a) Poph. 140.

(b) Sir T. Raymond. 430.

merely to diſtribute the pews among theſe, and does not extend further.

As to the poſſeſſion on which the plaintiff relies, there can be no poſſeſſion to ſupport ſuch an action as the preſent, but as belonging to the houſe. He was then ſtopped by the Court.

Wood, in ſupport of the rule, admitted that the plaintiff in this action had not a complete title as againſt the *ordinary*, but contended that it was a ſufficient title as againſt a *wrong doer*.

1ſt. No faculty was neceſſary. In *Burn's Eccleſiaſtical Law* (c) it is ſaid, " if the incumbent, churchwardens, and pariſhioners " agree that more pews are neceſſary, it doth " not ſeem that there is any neceſſity for the " ordinary's interpoſition." Therefore the plaintiff has made out a ſufficient title under the conſent of the miniſter and churchwardens in 1718, to build this pew.

(c) 1 Burn, 331.

2dly. But a faculty, if neceſſary, may be preſumed, the plaintiff and his anceſtors having had actual poſſeſſion above ſixty years. In *Rogers* v. *Brooks* (d), poſſeſſion for thirty-ſix years was held to be evidence of a preſcriptive right, though there was no evidence of a faculty from the biſhop, and though the church itſelf had been rebuilt within forty years.

(d) M. 24. G. 3. B.R. Vide poſt the end of the caſe.

3dly. There might probably be a doubt whether the plaintiff had a right as againſt the *miniſter* or the *ordinary*. But the defendant was a wrong doer, unauthoriſed by either of theſe perſons; and great inconvenience would reſult from permitting the defendant to diſturb the plaintiff in the enjoyment of his pew; becauſe the defendant himſelf may be evicted the next moment; and it would encourage a perpetual

perpetual struggle for the possession of the pews in the church. In *Kenrick* v. *Taylor* (e), it was held that bare possession was sufficient against a *wrong-doer*; and that the plaintiff need not shew repairs in an action against *him*, which would have been necessary in an action against the ordinary, (which distinction was taken in 1 *Lev.* 71. and 3 *Lev.* 73.) and the Court there said, "that it was a rule of law, "that one in possession need not shew any title "or consideration for such possession against a "wrong doer." The same doctrine is laid down in *Gibs. Cod.* 197, 8: with respect to the purpose of this action, as the plaintiff had possession he need not shew any title. Though in the case of *Kenrick* v. *Taylor*, it was laid as appurtenant to a messuage, yet that is not necessary; since a faculty would undoubtedly give a right, and that may be only to the person. Besides, it is said in that case in *Wilson*, that it is not necessary to prove a title as against a wrong doer: now if it be not necessary to *prove* it at the trial, it is not necessary to *alledge* it in the declaration; for the plaintiff need only alledge that which he is bound to prove.

(e) 1 Wils. 326.

Ashhurst, *J.*—In an action against a wrong doer, possession may perhaps be *primâ facie* a sufficient title, and it is not necessary to set forth so strict a title as in an action against the ordinary. As in the case in *Wilson*, where it was said, that laying the pew to be appurtenant to a messuage was sufficient; that must be taken to be legally appurtenant, which can only be by prescription, or by a faculty.

But a bare possession can never give a right, because every parishioner has a right to go into the

the church. And therefore it is the plaintiff's own fault if he does not gain to himself a complete title to a pew, which he may do, either by applying to the ordinary for a faculty, or to the minister or churchwardens to allot him a seat in the church. But if the plaintiff will not take the trouble of applying to the ordinary for a faculty, or to the minister or churchwardens to allot him a seat, he cannot maintain this action, though against a wrong doer; because he has not set forth that the pew is appurtenant to a messuage in the parish. If bare possession were allowed to be a sufficient title, it would be an encouragement to commit disorders in the church; for disputes would frequently arise respecting the possession.

BULLER, *J.*—This is an *action on the case*, and not an action of *trespass*. *Trespass* will not lie for entering into a pew, because the plaintiff has not the exclusive possession; the possession of the church being in the parson. The word "possession" must always be understood, *secundum subjectam materiam*: therefore in an action on the case for disturbing the plaintiff in his pew, for which trespass will not lie, the plaintiff must prove a right either by prescription, or by a faculty. I do not go the length which the defendant's counsel went, in saying that a faculty only extends to the first grantee; for if a faculty be annexed to a messuage, it may be transferred with the messuage to another person. And therefore if the plaintiff had declared for disturbance in a pew *as annexed to a messuage in the parish*, such a right would have been colourable, and against a wrong doer would have been sufficient. A pew may be annexed to an house by a faculty

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as well as by prescription, for the latter supposes a faculty. I have lately seen a faculty for exchanging seats in a church; after stating that *A.* in right of a particular house in the parish had immemorially a right to a certain pew in the church, the ordinary gave his consent to exchange it for another; but still each was annexed to the house. There cannot be a gift of a pew to a man without a faculty; it was so said in the case of *Rogers* v. *Brooks* (a), in which case it was laid *as appurtenant to an ancient messuage*. It was also said in the case in *Wilson*, that it must be laid as appurtenant to a messuage. But there never existed a case before the present, where the plaintiff attempted to make out a title to a pew, without laying it to be appurtenant to a messuage.

(a) Vide at the end of the case.

A faculty of a pew to a man and *his heirs* is not good; so of an aisle in the church. And Dr. *Burn* says (b), "No title can be good either upon prescription, or upon any new grant by a faculty from the ordinary to a man and *his heirs*; but the aisle must always be supposed to be held in respect of the house, and will always go with the house to him that inhabits it." 12 *Co.* 106. 2 *Keb.* 92. 2 *Bulst.* 150. 1 *Sid.* 88. Therefore I am of opinion that this nonsuit was right.

(b) 1 Burn's Eccl. Law, 316.

Rule discharged.

(a) Rogers v. Brooks & Wife, M. 24. G. 3. B.R.
A legal title to a pew may be presumed after thirty-six years possession.

This was an action on the case tried at the summer assizes at *Exeter* 1783, before *Perryn*, B. when the Jury found a verdict for the plaintiff, damages 1 *d*.

The declaration stated, that the plaintiff was possessed of an ancient messuage in the parish of *Biddeford*, and that he had, *as ap-*

purtenant

purtenant to that meſſuage, the uſe and occupation of a certain pew in the church in *Biddeford*; and that the wife of the defendant ſat in the pew, and prevented him from enjoying it, &c.

Plea the general iſſue.

At the trial, notice to the defendant's wife not to ſit there was proved. Several witneſſes ſwore, that above forty years ago this was an open pew; that about that time the church was pulled down; and that the rector and churchwardens, after the church was rebuilt, put the *Blinch* family (under whom the plaintiff claimed) into poſſeſſion of the pew, which they had enjoyed uninterruptedly ever ſince, till about two years ago; when the defendants (who claimed under another meſſuage in the pariſh, called the *Winxford* eſtate) began to moleſt them. That about thirty-ſix years ago, the plaintiff put a lock upon the door, and lined and matted the pew. That ſoon after the rebuilding of the church, a woman got over the pew, as if to claim for the *Winxford* family, but ſhe was turned out by the *Blinch* family.

One witneſs for the defendants ſwore, that the *Winxford* family ſat in the pew for thirteen years after the rebuilding of the church; and ſhe and other witneſſes ſwore as to the pew's being common.

The Judge told the Jury that, after ſo long a poſſeſſion as thirty-ſix years, they might preſume a legal title in the plaintiff. The Jury without heſitation found a verdict for the plaintiff.

Motion for a new trial on the ground that there was no evidence to be left to a Jury; becauſe from the plaintiff's own witneſſes it ap-

peared

peared that the ſeat was common forty years ago; and that they had proved a gift from the rector and churchwardens ſince the rebuilding of the church. This evidence, it was contended, deſtroyed the plaintiff's title which he claimed by *preſcription*.

After argument by *Groſe* Serjeant, and *Fanſhaw* againſt the rule, and *Morris* and *Kirby*, Serjeant, in ſupport of it,

Lord MANSFIELD ſaid—The queſtion in this caſe is, Whether there was *any* evidence at all to be left to the Jury?

The plaintiff's title to this pew is, that it has immemorially belonged to the houſe which he poſſeſſed. The defendant has ſet up a joint title in right of the houſe enjoyed by himſelf and another perſon. The plaintiff in ſupport of his claim proved, that he was put in poſſeſſion of this pew by the rector and churchwardens thirty-ſix years ago. The queſtion is, Whether this act of the rector was to give poſſeſſion under an *old immemorial right*, or in conſequence of a *new gift*? There are ſtrong reaſons to induce us to ſuppoſe it was not a gift; they would not make a gift of that which other people claimed. *A gift cannot be made without a faculty*, and there is none in this caſe.

The *Winxford* family have acquieſced for thirty-ſix years, which is almoſt double the time which the ſtatute of limitations requires as a bar in certain caſes.

WILLES, *J.*—It is obſervable that an attempt was made to diſturb the *Blinch* family in the enjoyment of their pew ſoon after the rebuilding of the church; but their right has been acquieſced in ever ſince.

One of the defendant's witnesses swore false, in saying that the *Winxford* family sat in the pew thirteen years after the church was rebuilt; for the church has only been built forty years, and the *Blinch* family are proved to have sat there thirty-six years without interruption.

It is very common when a church is rebuilt, to leave the adjustment of the pews to the rector and churchwardens; and thus I suppose the plaintiff got his pew at the adjustment in right of his messuage. But after so long a possession, I would presume any thing in favour of the plaintiff.

Per Curiam *, rule discharged.

Churchill v. Wilkins, M. 27 G. 3. B. R. Durnford and East, 1 V. 447. Where the contract declared upon was, that the defendant should deliver to the plaintiff all his tallow at 4s. per stone, and the contract proved was, that the defendant should deliver it at 4s. per stone, and so much more as the plaintiff paid to any other person. This was held a fatal variance.

This was an action upon the case, tried before *Eyre*, Baron, at the last summer assizes at *Oxford*, in which the plaintiff declared upon a special agreement, to buy of the defendant all the fat or tallow which the defendant should have to dispose of for twelve months, from the 31st of *July*, 1784, at the price of 4 *s.* *per* stone. There was a second count, stating the agreement to be, to deliver the fat or tallow at the price of 4 *s.* *per* stone, and two gallons of gin to be delivered at *Christmas*, with general counts.

The agreement proved was, That the plaintiff was to give 4 *s.* *per* stone, *and if he gave any other person more, he was to give the same to the defendant.* Upon which *Eyre*, Baron, being of opinion, that this was a material variance, nonsuited the plaintiff.

Plumer shewed cause against a rule which had been obtained for setting this nonsuit aside.

* *Buller*, J. was absent.

In

In order to maintain this action, the plaintiff ought to have stated in his declaration the entire contract; but he has omitted to set forth a most essential part, namely the *whole* consideration of the promise, which is now only *partially* set forth. Whether it would or would not have been necessary besides to aver performance, that is not at present material to be considered. If it had been stated generally that the defendant undertook to deliver to the plaintiff all his tallow, without expressing any consideration at all, it would have appeared to be *nudum pactum*, and therefore void. Then, if it was necessary to set out some consideration, it must be equally as necessary to set it out truly; for if the consideration proved is different from that which is laid, it is a fatal variance. The declaration should have stated the whole consideration, and then have averred that the plaintiff was ready to have paid the 4*s. per* stone, and so much more as he had given to any other person; for if, in fact, the plaintiff had given more to any other person, that would have been a substantial defence for the defendant, which upon this occasion he was precluded from going into.

As to *Ughtred*'s case (a), the distinction there taken was between conditions precedent and subsequent, and what was necessary to be averred; but that case does not say that it is not requisite to set out the whole contract. In *Cro. Eliz.* 888, where the declaration, after stating, that in consideration that the plaintiff would pay a sum of money, the defendant undertook to surrender a lease, only averred a tender of the money, without going on to say that it was either refused or accepted, the averment was held ill.

(a) 7 Co. 9.

Bower and *Abbot*, *contra*. The queſtion is, Whether this is a disjunctive contract? Here is enough ſet forth in this contract to ſhew the plaintiff's title, and that is all that is neceſſary. There was no precedent condition. 1 *Lutw.* 249. *Doctr. Pl.* 91. Where two conſiderations are in the alternative, the party who is to perform is at liberty to elect, and need only ſet forth ſo much as gives him a right to ſue. In *Laton* v. *Pearce* (a), the plaintiff, who ſued for a penalty under the lottery act of 17 *G.* 3. *c.* 46. declared as upon an abſolute agreement for £.20. The fact was, that the contract was in the alternative, either to take £. 20. *or* an undrawn ticket in the lottery; but the election was in the party *ſued*. There Lord *Manſfield* ſaid, that if the option had been in the plaintiff, and he had elected to take the £. 20. the contract would have been ſufficiently ſtated, becauſe he would thereby have converted the agreement into an abſolute contract for the payment of the money; and then the other part of the alternative in the original bargain would become ſurpluſage. Here it was in the power of the plaintiff to elect whether he would give more than 4 s. *per* ſtone to any body elſe; and having elected, he reduced the contract to a certainty; and then the whole is ſet out, and there is no ſubſtantial variance between the contract laid, and that proved. If a contract is variable upon a contingency which does not happen, the original contract becomes abſolute.

(a) Dougl. 15.

This caſe may be conſidered in another view. The contract in effect is, that the plaintiff will buy of the defendant all the tallow at a certain price, *provided* that, if he gave more to any body elſe, he would give the ſame to the defendant.

defendant. Then how is the defendant precluded by this declaration from entering into the nature of his defence? It is enough for the plaintiff to ſhew that part of the contract which he is to perform, and upon the trial the defendant may take advantage of the proviſo by way of defence.

As to the caſes which make a diſtinction between conditions precedent and ſubſequent, they are not applicable to the preſent; for here nothing more was to be performed by the plaintiff. He could not have proved that he had not paid more than 4 s. *per* ſtone to any other perſon; therefore it was not neceſſary to alledge it, becauſe it would have been averring a negative.

Ashhurst, *J.*—This nonſuit is proper. It was incumbent on the plaintiff to ſtate his caſe truly. But the contract, as ſtated, is different in ſenſe from that which is proved. For a contract, that the defendant ſhall deliver all his tallow *at a particular price*, is not the ſame as a contract, that he ſhall deliver it at that price, *or at a greater*, on the happening of a particular event. The plaintiff ſhould have ſtated the whole, and then have averred that he had not given more than 4 s. *per* ſtone to any other perſon, and that he was ready to have paid that ſum.

As to the caſe of *Laton* and *Pearce*, it does not appear to me to contradict that principle.

Buller, *J.*—I wiſh to have an opportunity of looking into the caſe of *Laton* and *Pearce*, before I finally decide this. But laying that out of the queſtion for the moment, (for I think it will not be found to apply) this caſe admits of no difficulty.

 This

This is an action on a ſpecial agreement. The agreement is the giſt of the action, therefore it muſt be ſtated truly. And this does not claſh with the principle drawn from the caſes cited by the plaintiff's counſel, which ſays that the plaintiff need not ſet forth different parts of an agreement which are not eſſential to the right of action; for here the contract proved is different in ſubſtance from that which is alledged. For the declaration ſtates, that the plaintiff was at all events to pay *only four ſhillings*, whereas the contract proved was, that he was to pay *ſo much*, or *ſomething more*, as events might happen. They differ therefore in this reſpect; the agreement ſtated in the declaration is for a particular price *abſolutely*, whereas that proved is for the ſum ſtated in the declaration, *or ſome other price conditionally*.

This is not the caſe of an alternative contract; where the party has his option to do one thing or another, but it depends upon a contingency; becauſe according to ſome future event it is a contract for a greater or a leſs ſum. Therefore the term *alternative* is improperly uſed here. Neither is this like the queſtion in *Ughtred*'s caſe. But the queſtion here is, Whether the plaintiff muſt not ſtate the contract as it is? and whether he can ſtate a contract as abſolute, when, whether it is abſolute or conditional, depends on the event of another fact.

I will look, however, into the caſe of *Laton* and *Pearce*, and if it makes any difference in my opinion, I will mention this caſe again.

Rule diſcharged.

On

On the next day, *Buller*, J. said, that the case of *Laton* and *Pearce* was rather against the plaintiff than otherwise: for the Court, in that case, held the variance to be fatal. But he observed that that was an *alternative* contract.

This action, which was brought against the defendant upon the 11 *Geo.* 2. *c.* 19. *f.* 12. for secreting an ejectment, was tried at the last *Leicester* assizes, before *Heath*, *J.* when the plaintiff was nonsuited. It appeared that in 1785, the premisses being in mortgage, and the mortgage forfeited, the defendant (who was tenant to the plaintiff) had agreed, in a conversation which he had with the attorney of the mortgagee, to attorn to him from that time; but the attorney, not thinking the promise sufficient, delivered to the defendant an ejectment in *April* 1785, informing him at the same time, that it was only for the purpose of procuring a written attornment, and that it would not be prosecuted further; in consequence of which, the defendant actually attorned to the mortgagee. He gave no notice to the landlord, either of the ejectment or of the attornment; for omitting the former of which, this action was brought. The learned Judge being of opinion that this case did not come within the statute, nonsuited the plaintiff; which nonsuit,

Buckley v. Buckley, E. 27 Geo. 3. B. R. Durnford and East, 1 V. 647.

A tenant to a mortgager, who does not give him notice of an ejectment brought by the mortgagee, to enforce an attornment, is not liable to the penalties of the 11 Geo. 2. c. 19. f. 12. for secreting ejectments.

Balguy now moved to set aside; contending that the secreting of this ejectment was productive of some of the inconveniences which the act intended to remedy, because by these means the mortgagor had been prevented applying to this Court to stay the proceedings

 of

of the ejectment on paying the principal, interest, and costs.

The COURT however were of opinion, that this case did not come within the statute; for that it only extended to cases where ejectments were brought which were inconsistent with the landlord's title. They observed likewise that the ejectment was brought for the purpose of compelling the tenant to attorn to the mortgagee, which the act expressly permitted him to do.

Rule refused.

Smith v. Chester, E. 27 G. 3. B. R. Durnford and East, 1 V. 654.

In an action against the acceptor of a bill of exchange, it is necessary to prove the hand-writing of the first indorser, notwithstanding such indorsement was on the bill at the time it was accepted.

Indorsee of a bill of exchange against the acceptor.—It appeared at the trial before *Buller*, J. at the last sittings at *Westminster*, that when the bill was accepted, there were several indorsements on it. But the plaintiff, not being able to prove the hand-writing of the first indorser, was nonsuited.

Bower now moved to set aside this nonsuit, on the ground that as these indorsements were on the bill, at the time of the acceptance, they must be taken to have been admitted by the drawee, and he could not afterwards dispute them; and he cited in support of this, a determination of Lord *Mansfield*'s in the case of *Pratt* against *Howison*, at the sittings after *Trin.* term, 23 *G.* 3. at *Guildhall*, and another case in *Sayer*, 223. observing that there would be great hardship in the case of foreign bills of exchange in many instances, on account of the difficulty and inconvenience of proving the hand-writing of the first indorser, who may be unknown to the holder.

ASHHURST, *J.*—The law has been otherwise settled; and if it were not so, there would be no difference in this respect, between bills

payable

payable to order, and thoſe payable to bearer. And it would open a door to great fraud.

Buller, *J.*—This point was much conſidered in a late caſe before this Court, when they were perfectly clear, that an indorſee of a bill of exchange, in an action againſt the acceptor, was obliged to prove the hand-writing of the firſt indorſer. For when a bill is preſented for acceptance, the acceptor only looks to the hand-writing of the drawer, which he is afterwards precluded from diſputing; and it is on that account that an acceptor is liable, even though the bill be forged.

Grose, *J.*—This matter appears extremely clear; for a bill of exchange is no payment to the perſon in whoſe favor it is drawn, unleſs it is indorſed by him.

Rule refuſed.

Green v. Rennett, E. 27 G. 3. B. R. Durnford and Eaſt, 1 V. 656.

In an action againſt the defendant for negligence as an attorney, in not proſecuting a debtor of the plaintiff's to judgment; the return of the writ on which the debtor was arreſted being laid to be in the 25th year, &c. and the writ itſelf appearin to have been returnable in the 24th year, &c. this was held to be a fatal variance, even though the day of the return

In this action againſt the defendant for negligence as an attorney, the declaration ſtated, that the plaintiff's inteſtate had retained the defendant to proſecute one *John Schultze* for £.625, due on a bond; and that the defendant had promiſed diligently to proſecute the ſaid ſuit, *&c.* It then ſtated that afterwards, to wit, on 24th of *January* 1785, the defendant ſued and proſecuted a bill of *Middleſex*, returnable on *Monday* next, after fifteen days of St. *Hilary*, and delivered it to the ſheriff, who made his precept, under which *Schultze* was arreſted, and detained by him, 'till the ſaid *Schultze* afterwards and before the return of the ſaid precept, to wit, *on 31ſt of January in the year aforeſaid,* was in due manner committed to the cuſtody of the marſhal, *&c.* that though the ſaid defendant, whilſt the ſaid *Schultze* was in cuſtody, *&c.* to wit, in *Eaſter*

term

was alledged in the declaration under a videlicet.

term in the year aforesaid might, and ought to have obtained and signed a judgment against the said *Schultze* for the said debt, yet the defendant well knowing, &c. did not truly and diligently prosecute the said suit, &c. and did not then, or at any time whatsoever, obtain or sign any such judgment therein; by reason whereof the said *Schultze* afterwards, to wit, on the 4th of *November* 1785, was in due manner superseded and discharged, the said debt being wholly due and unpaid.

The writ was in fact sued out on the 24*th of January* 1785, but by a mistake it was indorsed on the 24*th of January* 1784. At the trial of this cause before *Buller*, J. at the last sittings at *Westminster*, on the production of the writ, it was objected that there was a material variance between the writ and the declaration, the writ itself appearing on the face of it to have been sued out in *January* 1784, but that was over-ruled; but the learned Judge being of opinion that *the return of the writ* was material, and there being a similar variance in that respect, nonsuited the plaintiff.

Gibbs now moved to set aside this nonsuit, contending, that as this was an action against the defendant for negligence in not prosecuting a person to judgment, it was equally immaterial when the writ was returnable, as when it was sued out. That the damage to the plaintiff, which was the gist of the action, was precisely the same, at whatever time it was returnable. Supposing the defendant had sued out a void writ, the action would have lain; therefore, if it be immaterial whether the writ be good or not, the return of it must be equally so. At all events, it may be rejected as coming under a *videlicet*. He then cited a case of

Nichols

Nichols qui tam v. *Bamfylde*, at *Bodmin summ. ass.* 1784, before *Hotham*, Baron. It was an action of debt on the stat. *Wil.* 3. against an excise-officer for soliciting a vote at *Mitchel* for the late election. The declaration stated the writ and delivery to the sheriff; and that he afterwards, and before the return thereof, to wit, on the 4th of *April*, made his precept in writing. The evidence was of a precept dated 1st of *April*. *Grose* objected to it as a variance, with which Baron *Hotham* concurred, and nonsuited the plaintiff. A motion was made the ensuing term in the Court of Common Pleas, to set aside the nonsuit, and grant a new trial, which was accordingly granted, that court entertaining no doubt on the question.

But in this case *the Court* were all of opinion, that the time when the defendant ought to have charged *Schultze* in execution depending on the *return* of the writ, *the return* became material, and therefore the variance was fatal.

Rule refused.

Holliday v. Camsell and White, E. 27 G. 3. B. R. Durnford and East, 1 V. 658.

A member of an amicable society intrusted with a box, containing the fund, and bound by bond to keep it safely, cannot maintain trover against another member, and a third person, who take it from him.

In this action of trover, which was brought to recover a box of money, *Heath*, J. before whom it was tried at the last assizes at *Nottingham*, nonsuited the plaintiff, on the ground that one tenant in common could not maintain an action of trover against another. The circumstances were these; the plaintiff and defendant, *Camsell*, were members of a friendly society, which was instituted for the purpose of relieving each other in case of sickness or other disability. The fund for this purpose was levied by weekly contributions from each of the members; and the aggregate sum was kept in a box which was deposited in the plain-

tiff's

tiff's houſe, who was an innkeeper; and a bond was given by him for the ſafe cuſtody of it. *Camſell* got poſſeſſion of this box, carried it away, and delivered it to the other defendant *White*, who was not a member of the ſociety.

Galley moved to ſet aſide this nonſuit, and contended that the plaintiff had a *ſpecial* property in the box, excluſive of any right which the defendant had in it; for the box with its contents was lodged in the plaintiff's hands by the club, and he had given ſecurity for the ſafe cuſtody of it. But the defendant had no other intereſt than a mere contingency in the event of his ſickneſs, and then only in a certain proportion. No perſon therefore had any right as againſt this plaintiff, but the majority of the club, by whom alone he could be releaſed from his obligation. Beſides, the rule of law, that one tenant in common cannot maintain an action of trover againſt another, does not apply in caſes where the poſſeſſion of that other is tortious. And here the defendant has no right whatever to keep poſſeſſion of the box againſt the conſent of the plaintiff.

Ashhurst, *J.*—The rule of law is undoubtedly true, and applies to this caſe. All the members of this ſociety have a joint property in the box and its contents; they are therefore tenants in common, and one tenant in common cannot maintain trover againſt another.

Buller, *J.*—It is here admitted, that one of the defendants was a member of this ſociety, and conſequently had a general property in the box; at any rate therefore a ſpecial property cannot give a right in this action againſt a general property. The *cuſtody* only is committed

mitted to the plaintiff, the *property* remains in the society.

Grose, J. of the same opinion.

Rule refused.

Moore and others v. Wilson, E. 27 G. 3. B. R. Durnf. and East, 1 V. 659.

In an action by the consignor of goods against a carrier for non-delivery, where the plaintiff averred, that the defendant undertook to deliver, &c. in consideration of the hire to be paid by the plaintiff, proof that the hire was to be paid by the consignee was held to be no variance, the consignor being by law liable.

Assumpsit against a common carrier for not safely carrying and delivering goods sent by the plaintiffs. The declaration stated, that the defendant undertook to carry the goods "for a certain hire and reward, to be paid *by the plaintiffs*." It was proved at the trial, that *Clarke*, the consignee, had agreed with the plaintiffs to pay the carriage of the goods, which the defendant's counsel contended did not prove the declaration. And

Buller, *J.* before whom the cause was tried at *Guildhall*, being of that opinion, nonsuited the plaintiffs.

Law had obtained a rule on a former day to shew cause why the nonsuit should not be set aside on the ground that the allegation, that the hire was to be paid *by the plaintiffs*, was immaterial, and that in all cases of this kind the contract was virtually made between the carrier and the sender of the goods. That no private agreement between the consignor and consignee could vary the question as between the consignor and the carrier. That, though the consignor might have parted with the property in the goods, he might maintain an action against the carrier. *Davis Jordan* and *James*, 5 *Burr.* 2680. *Vale* v. *Bayle*, *Cowp.* 294. but at all events, the consignor might be considered as the agent of the consignee for the purpose of bringing this action.

Buller, *J.* on this day said, that on considering the question, he found he had been mistaken in point of law; for, that, whatever

might

might be the contract between the vendor and the vendee, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable. And the other two Judges being of the same opinion, the rule was made absolute without farther argument.

Rule absolute.

King v. Pippett, E. 27 Geo. 3. B. R. Durnford and East, 1 V. 695.

Where the defendant carries down the record by proviso, it is sufficient if he obtain the usual rule for trial by proviso any time before trial, even though it be obtained after he has given the plaintiff notice of trial.

It having been determined in last *Michaelmas* term (a), that the defendant was not entitled to sign judgment as in case of a nonsuit in this cause, because he might have carried the record down to trial, at the last summer assizes, by proviso, the defendant, on the 8th of last *March* (the commission day being the 19th) gave notice of trial, and on the 10th of *March*, obtained and served the usual rule for a trial by proviso; and the plaintiff, not appearing at the trial according to this notice, was nonsuited.

Law now moved to set aside this nonsuit, contending, that the notice given by the defendant was irregular for want of the antecedent rule to support it. 2 *Stra.* 1055.

Gibbs was to have opposed it in the first instance; but *the Court* said, that, according to the old established practice, wherever the defendant carries down the record to trial by proviso, he must obtain a rule, that in case the plaintiff should make default, he might be at liberty to go to trial. But the only use of that rule is, that if two records are carried down to trial (the one by the plaintiff, and the other by the defendant) the former only should be tried. Then it is quite sufficient if the defendant has this rule at the trial. Besides, no inconvenience can result to the plaintiff from

(a) Durnford and East, 492.

† this

this practice; becauſe, if the defendant does not carry down this record to trial after notice, he is liable to pay the plaintiff his coſts.

And the maſter of the Crown-office informed the Court, that in criminal trials, where the defendant carries the record by proviſo, no ſuch rule is obtained at all.

Rule refuſed.

IX. Of other Matters respecting new Trials, &c.

(17.) *Of Costs on new Trials.*

Vide ante III. The *Queen v.* the Bailiffs, *&c.* of *Bewdley*, and IV. *Tamplin* and *Vorsell.*

Mason v. Skurray. T. 20 G. 3. B. R. Doug. 421.

Where a new trial has been granted and nothing was said in the rule concerning the costs of the first, although the same party succeed on the second trial, he shall not have the costs of the first.

ACTION on a policy of insurance; verdict for the defendant; new trial granted; and a second verdict for the defendant. The rule for a new trial had not been drawn up, "upon payment of costs," nor had the costs been reserved. On *Saturday* the 27th of *May*, *Cowper* obtained a rule to shew cause why the defendant should not be allowed the costs of the first trial.

Dunning now shewed cause.

Lord *Mansfield* absent.

The Court said, as nothing had been said about the costs of the first trial in the rule, and they had not been reserved to abide the event of the second verdict, the defendant was not entitled to receive them.

The rule discharged.

IX. Of other Matters respecting new Trials, &c.

(18.) *Of Privy Verdicts.*

Vide post, Essay IV. *Gay* v. *Cross.*

IN *quid juris clamat* the tenant said, that he had held in tail of the gift of one *A.* The plaintiff said, that *A.* did not give; upon which they were at issue, and the *nisi prius* was in the county of *North'*, where before *Dyer*, and *Benlowe*, the inquest was charged upon the said issue; and the Jurors departed from the bar, and after the rising of the Court, they came again before the Justices, and gave a privy verdict for the defendant, and had leave to eat and drink; and afterwards, at another day, when the Court was sitting, they came again, and gave their verdict openly for the plaintiff.

T. 3 Eliz. Mo. 33. n. 108. Privy verdict for the defendant, public verdict contra for plaintiff.

Jurors eating and drinking.

And all this matter was entered upon the *postea.* And at the day in bank, the question was, for which of the parties judgment should be given? And the opinion of all the Justices was, that judgment should be given for the plaintiff; for the last verdict which was given openly in Court is the verdict in fact, and not the first; for upon a privy verdict before the Justices none of the parties shall be demanded; and if one of the jurors dies between the first verdict given, and the second, or if the judge die, the verdict taken before is void:

and yet neither the one nor the other, after the ſecond verdict given ſhall hurt, but judgment ſhall be given. So alſo if the next day, the jurors will not ſay any thing, the acceptance of the privy verdict ſhall be nothing to the purpoſe, for the giving of this verdict is only ſuffered for the eaſe of the jurors. And it is ſaid per *Dyer*, that eating and drinking before the giving of the ſecond verdict, ſhall not make the verdict void, becauſe it was by licence of the juſtices, and it was alſo at their own coſts. And although the jurors, before giving their verdict, eat and drink, yet this ſhall not avoid the verdict, unleſs it be at the coſts of one of the parties; for if it be at the coſt of the jurors themſelves, it is not material, as was lately adjudged in the caſe of one *Powleſkin*, of *Cornwall*.

As to the Jurors eating and drinking.

And *nota*, That *Brown* moved in this caſe what judgment the plaintiff ſhould have, if to recover the land or not: for upon ſuch claim it is clear, that the defendant had forfeited the land; and for ſuch claim, the grantee, as it ſeems to me, may enter immediately without more: but if judgment ſhall be given to recover the land, I have never ſeen any precedent.

Moor, 33.

IX.

IX. Of other Matters respecting new Trials, &c.

(19.) *Of a Distringas or Venire facias de novo.*

Vide ante III. *Bro. Ab. tit. Verdict*, 17, 18. IX. (3.) *Rex v. Woodfall*, IX. (10.) *Eddowes v. Hopkins*; *et post*, *Essay* V.

EFORE we proceed to cases of *Venire facias de novo*, after trials, we shall state from 1 *Brownlow*, some particulars worthy notice, respecting *mesne*, and *jury process*, &c. as the law stood at the beginning of the reign of *James* the first.

In trespass the process is attachment and distress infinite, but if *nihil* be returned, process of outlawry lies; and if the defendant be returned attached by his goods and chattels, if he omit to cast an essoyn at the return of the writ of attachment, he shall forfeit the goods by which he was attached; but if he cast an essoyn, he shall have a special writ (reciting the matter) to the sheriff, to deliver to him his goods or cattle, although he do not appear at the day of adjournment of the essoyn: and if the defendant at the return of the attachment will appear without an essoyn, he may, and then he shall not forfeit the goods: and note, the essoyn shall not be adjourned by, from fifteen days to fifteen days.

M. 2 Jac. 1. Brownl. 193. Of jury process, challenges, venire facias de novo, &c.

 and

and if the original writ be againſt many, they ſhall have but one eſſoyn in perſonal actions: and if a lord of the parliament appear not, he ſhall forfeit an hundred pounds; and upon iſſue joined in this action, the proceſs againſt the jury, is the *venire facias*, *habeas corpus*, and *diſtreſs*: and if a baron of the parliament be a defendant, then if a knight be not returned upon the pannel, the defendant may at the aſſizes quaſh the pannel; and if at the aſſizes the jury do not appear full, to wit, twelve men, this may be ſupplied by the juſtices at the requeſt of the plaintiff, and the ſheriff ought to return two hundreders, at the leaſt, in this action, and ſo in every perſonal action: but four in real actions, for if a challenge be made *pro defectu hundredorum*, if two be not returned, the jury ſhall remain; and a *diſtringas*, with a *decem tales* ſhall be awarded, returnable in court, but no *circumſtantes* ſhall be awarded in court, for if the jury in court do not appear full, or are challenged, for that the jurors have no freehold, and it be tried, a new *habeas corpus* ſhall iſſue out with a *decem tales*, if it be deſired: and if the jury appear full in the court, and the array be challenged, either for that it was of the plaintiff's nomination, or that the ſheriff or under-ſheriff, who returned the jury, is of the kindred of the plaintiff, or any other principal cauſe of challenge, and this is confeſſed or tried by two of the jurors who have appeared, being aſſigned and ſworn by the court to be triers of the challenge, who ſhall give their verdict that the challenge is true, then the array ſhall be quaſhed; and if he that arrayed the pannel remain ſheriff, the *venire facias de novo* ſhall be awarded to the coroners, if there be no cauſe

of

of exception againſt them, or any of them by reaſon of kindred, or any other principal cauſe: and if there be cauſe of challenge to any of them, the *venire facias* ſhall iſſue to the reſt, and his companion ſhall not intermeddle with the execution of it; and if there be good cauſe againſt all, then a *venire facias* ſhall iſſue to *eſlizors* to be appointed by the court to return the writ, but if the ſheriff who returned the firſt pannel be removed, then a new *venire facias* ſhall iſſue to the ſheriff who ſhall be then in office: and note no challenge ſhall be made to the array returned by the *eſlizors* but to the poll: and if the jury appear full, and no challenge be made until twelve be ſworn, the jury ſhall proceed to hear their evidence, and give their verdict; and if the jury find for the plaintiff, then they ſhall give coſts and damages, but if they find for the defendant, they ſhall find neither coſts nor damages: and the judgment for the plaintiff is, that the plaintiff ſhall recover his damages found by the jury, and coſts of ſuit; but if the jury find for the defendant, the judgment is, that the plaintiff *nil capiat per breve*; but if judgment in this caſe had been by *nil dicit*, *confeſſion*, or *non ſum informat*. then the court ſhall award to the ſheriff a writ to enquire of damages, and no challenge lies to the jury upon a writ to enquire: and if the ſheriff return but twenty and one upon the jury, and twelve of them appear, and try the iſſue and give a verdict, it is a good verdict; but if only ten or eleven of them appear, and the jury be made up at the aſſizes, *de circumſtantibus*; and the iſſue be tried, and a verdict given, it is naught, and not holpen by the ſtatute: and if the iſſue be joined, and the ſheriff be couſin to the defendant, the plaintiff ſhall not have a *venire*

facias upon the challenge of kindred of the sheriff to the defendant, but it ought to stay until that sheriff be removed and another sheriff made: and if the defendant be lord of the hundred, within which hundred the ten doth arise, the plaintiff may shew that, and have a *venire facias* to the next hundred; or if the array be quashed for that cause, he may have a *venire facias* to the coroners of the next village in the next hundred next adjoining: and note, the *venire facias* shall not issue to the coroner but upon the principal challenge; and if a challenge be to the *tales*, and that be found true, the *tales* only shall be quashed, and the principal pannel shall stand: and if an issue be joined between the mayor and commonalty of a city, and another concerning a trespass done within that city; the plaintiff surmising that the sheriff and coroners are citizens of that city, may pray a *venire facias* to the next county, or the body of the county, or of the next villages in the next county: and if the challenge of kindred be not rightly alledged in the challenge, it matters not if it be kindred; and if a *venire facias* be quashed, because it was returned by the under sheriff, who was kin to him, or other good cause, it shall be quashed, and the *venire facias* shall be returned by the high sheriff, with words in it, that the under sheriff shall not intermeddle with it: and if the array be challenged and affirmed, the defendant may after challenge the poll, and must shew his cause of challenge presently: and if the land in question lie in four hundreds, if fou. of any hundred appear, it is good; and note, that the challenge of the array shall be drawn in paper, and delivered presently after the jury appears; and the defendant is not bound to make good his chal-

lenge

lenge with theſe words, *Et hoc parat. eſt verificare, &c.* And thoſe that try the principal challenge may alſo try the challenge upon the *tales*. If the king had been party alone, no challenge was to be allowed, but if the ſuit had been in the name of another, who ſued as well for the late king as for himſelf, in a writ to enquire of waſte after a diſtreſs, no challenge to the poll lies.

It is good cauſe to challenge a juror becauſe he was attainted in a conſpiracy or attaint, or if any juror was put into the pannel at the deſire of the party, it is good cauſe of challenge to the array: and if a jury be of two counties, and both arrays are challenged; two of one county ſhall try the array of that county, and two of the other county ſhall try the array of the other county; and they ſhall not join until they be ſworn of the principal, and two of one hundred, and two of the other hundred do ſuffice. If in treſpaſs the defendant juſtify as a ſervant to the lord, and by his commandment, it is good cauſe of challedge to the juror, that he is a tenant to the lord although the lord be no party to the record; and if proceſs by challenge is awarded to the coroners, the proceſs afterwards ſhall not go to the ſheriff, although there be another ſheriff, but after judgment execution ſhall iſſue to the new ſheriff: and where a man challenges the polls of the principal pannel, he afterwards ſhall not challenge the array of the *tales*, and if the array be quaſhed, it is entered upon record, but if it be affirmed, then it is not entered. If treſpaſs be done in divers towns in one ſhire, they may all be joined in one writ, to wit, why by force and arms the cloſes and houſes of the plaintiff at A. B. and

C. the defendants have broken: and, *&c.*

Stat. 14 Eliz. c. 9.

A *tales, &c.* may be granted at the prayer of the defendant.

Stat. 4 and 5 W. and M. c. 24. § 20.

No fee shall be taken on return of a *tales.*

Stat. 7 and 8 W. 3. c. 32. § 3.

The tales to be of jurymen returned on other pannels.

Stat. 27 Eliz. c. 6. § 5.

Two hundreders appearing shall be sufficient.

Stat. 24 G. 2. c. 18. § 4.

No challenge to the array for want of a knight.

Stat 7 and 8 W. 3. c. 32.

After a *venire* returned, if the cause is not tried, a new *venire* may be sued out.

A great variety of other provisions respecting juries, have been made by several statutes, not necessary to be here farther noticed. *Vid. Tab.* to *Stat. tit. Juries. Vide post* at the end of the case, next but one.

Laxworth v. West, Mich. 3 Jacobi. 1 Brownl 203.
Trespass, two issues, the subject of which are in different places. Venire mis-awarded.

Trespass brought for the taking of hay severed from the ninth part of *Elthorp*, in the county of *Warwick*, the defendant to *part* pleads *Not Guilty*, and to the *residue* pleads a *devise* of the parsonage made by *Lepworth* to the defendant at *Wapenbury* in the same county, and to enable the devise for tithes in L. alledges L. to be a hamlet at *Wapenbury*, to the intent that the whole tithes may pass: and upon a *non devisavit*, the *ven.* was of *Wapenbury*, and found for the plaintiff, that *T. L.* did not devise it, and the other issue of not guilty found for the defendant, and moved in arrest of judgment, that the *venue* was mistaken, because it was of *Wapenbury* only, and not of *Elthorp*, and they of *W.* could not try a matter in *E.* and although it was answered, that the defendant himself by his plea had confessed that *E.* was but an hamlet, yet the Court held the *venue* mistaken; for when the

plaintiff

plaintiff declares of a treſpaſs in *E.* this by general intendment is preſumed to be a village: of which village the matter which is there in queſtion ought to be tried: and although the defendant had alledged *Elthorp* to be an hamlet; yet it was but to enable the deviſe, and doth not extend to the iſſue before joined upon the not guilty for part; for in that iſſue both parties agree that *Elthorp* is a village, and it is a perfect iſſue taken, which hath not any coherence with the other iſſue of *non deviſavit:* but if the defendant had to the whole iſſue pleaded the deviſe as his excuſe, and had alledged *E.* to be an hamlet of *W.* and that only had been in iſſue, there the *venue* awarded had been good of *W.* only; but in this caſe it was adjudged that the *venire* was miſ-awarded, and that the plaintiff ſhould have a *venire facias de novo.*

An action of treſpaſs brought for breaking the plaintiff's cloſe called *G. in Woodthorpe*, in the county of *Derby*, to the damage of, *&c.* The defendant pleads that the cloſe was known as well by the name of *G.* as by the name of *D.* and that it was and had been, time out of mind, parcel of the manor of *Wigenworth*; and pleads his freehold in the manor: the plaintiff maintains his declaration, and traverſes that the place where, *&c.* was parcel of the manor, and upon this they are at iſſue, and a *venire facias* awarded of *Woodthorpe* only: and moved in arreſt of judgment by the defendant, the verdict being for the plaintiff, and urged that it was a miſtrial, for the *venire facias* ought to have been as well of the manor, as of *Woodthorpe*; for although the parties be agreed, that the place where

Kniveton v. Roylie, M. 8 Jacob. 1 Brownl. 218. Treſpaſs, liberum tenementum in the manor of Wig. venire of Wo. venire ought to have been of both—Venire facias de novo.

where the trespass was committed lies in *Woodthorpe*, yet that being supposed indeed to be parcel of the manor of *Wigenworth*, the *venue* of the manor by intendment have a more perfect and better knowledge of it than the village of *Woodthorpe* only; which was agreed by the whole Court, and a new *venire* awarded to try the issue again.

What the law *was*, hath been already shewn under this head.

Now as to the *venire facias*, by statute 4 *Ann. c.* 16. *s.* 6, every such writ for the trial of any issue in any of the cours of record at *Westminster*, shall be awarded of the *body* of the proper *county* where such issue is triable. But *per s.* 7. not to extend to writs of *appeal* of felony, murder, *&c.*

Perriman v. Pierce, M. 20 Jac. B. R. Palm. 303.

Construction of the words proximo consanguinitatis de sanguine of the devisor in a devise.

In *ejectment* the Jury found a special verdict to this effect, that one *Harpur* was seised of soccage land (in question) in fee, and had issue eight daughters, and one son, by three several *venters*; and that he devised this land to *Catharine* his youngest daughter by the last *venter*, for life, remainder *proximo de sanguine*; remainder in tail to *William* his son by the same *venter*, and if he should die without issue of his body, remainder for life to two others of his daughters by the middle *venter*, remainder *proximo consanguinitatis de sanguine* of the devisor. The devisor died: *Joan*, the eldest daughter, to whom nothing was given by express name by the will, died, having issue *John* and *William Perriman* the lessor of the plaintiff; and they only found generally, that *Joan* had *John* and *William*, that *William* entered claiming with his brother, as *proximus de sanguine*; but they did not find that *John* was the eldest

eldest son, or that he was heir: they found that *William* the son of *Harpur*, to whom the tail was limited died without issue, and that all the daughters died without issue, but the two daughters, who were advanced by express estates in the will, and except the eldest daughter, who had issue the said *John* and *William*, and if upon the whole matter, *&c.* And the question was who should have the land by the words *proximo consanguinitatis de sanguine* of the devisor; *scil.* the issue of the eldest only, or the issues of all the daughters, or the second son of the daughter *Joan*; the eldest daughter had issue *John* and *William*: *John* had issue the lessor of the plaintiff; if he being her grand-child, shall have before the son of the eldest daughter, or if the eldest shall be said to be nearer, than the son of the son of the eldest: and it was argued by *George Crooke*, that the son of the son of the eldest daughter should be preferred. 1. He said, that the issues of those, who are advanced by express estate, are excluded from taking any implied estate; also *proximus de sanguine* in legal construction is the eldest; and for this he urged 30 *E.* 3. 27. 30. *Ass.* 47. Also all the daughters may not take *here*, for the singular word *proximo*, which excludes all multiplicity in wills, as 1 Co. *Archer*'s case, *proximo hæredi*; and he applied to this purpose *Chapman*'s case, 18 *Eliz. Dyer*, where the eldest of the family was preferred; and *Clacke*'s case, 16 *Eliz.* and 1 *Eliz. Frencham*'s case; where a special estate limited, excludes a general estate implied; as if it be given to a *feme durante viduatate*, and after her death, remainder to a stranger, this does not give an estate for life to a *feme*.

Bridgman

Bridgman and *Trotman contra*, becauſe all the daughters are in equal proximity of blood to the deviſor, as 5 *E.* 6. for having letters of adminiſtration; and 3 *Co. Ratcliffe*'s caſe; alſo the mother of *Perriman* was dead before the remainder fell, and becauſe the two ſons are nearer to the deviſor, than the ſon of the eldeſt ſon of *Joan. Briton*, 189, ſaith, that the ſecond daughter ſhall elect before the iſſue of the eldeſt daughter, with which agrees 30 *E.* 3. 25. and *Bracton* ſaith, *quod nomine hæredis includitur tota poſteritas.*

And ſo of daughters, the eldeſt ſhall have all.

And after ſeveral motions, it was reſolved by *Dodderidge*, *Houghton*, and *Chamberlaine*, that judgment ſhould be given for the plaintiff *(abſente Lea, Chief Juſtice)* but they did not agree in the reaſon of this reſolution; *Houghton* held, that if one hath iſſue three ſons, and deviſes to the youngeſt in tail, *remanere proximo conſanguinitatis*, that the eldeſt ſhall have all, becauſe the word *proximo* declares the intent of the deviſor, that one only ſhall have, admitting that they are in equal proximity of blood; and to this reaſon *Chamberlaine* agreed; and he ſaid, that ſo it was held in *Levett*'s caſe, 25 *Eliz.* by all the Juſtices; and *Chapman*'s caſe *ſupra*; and he ſaid that the diverſity was there taken, when the words are *propinquioribus*, that there all ſhall take; but *aliter* when it is limited *proximo:* which was denied by *Dodderidge*; becauſe there is not any diverſity between *nearer* and *neareſt*, any more than between *no* and *not*; alſo *Houghton* ſaid, that if one hath three ſons, and the eldeſt is attainted, and land is deviſed to the youngeſt, remainder *proximo de conſanguinitate*, that the king ſhall take all: *Dodderidge contra*; but in ſuch caſe their iſſue ſhall have it; for although the bond of

of marriage is gone, and the blood corrupted for producing heritable iſſue, yet they may take by purchaſe, becauſe they are of his blood; but *Dodderidge* held, that all the daughters, and the ſons alſo in caſe of purchaſe and conſtruction of the will, are as near in blood, and they ſhall equally enjoy the land purchaſed; for the blood of the youngeſt iſſue, in nature, is in the ſame degree with the blood of the eldeſt; but *aliter* it is in the caſe of deſcent; but the reaſon of this is drawn from the general cuſtom of the realm, which conveys the land by deſcent to the eldeſt only; but this alſo is grounded upon the law of God, that the eldeſt, who opens the womb, ſhall be ſanctified to God, and ſhall be deemed by ſacrifice; *aliter* of *femes* as appeared with reſpect to the daughters of *Selaphead*; but by him, although the daughters are in the ſame proximity, yet the youngeſt ſon of the deviſor is nearer to him than the ſon of the ſon of the eldeſt daughter; but by him and *Houghton* and *Chamberlaine* this is not the caſe here, for the eldeſt daughter herſelf ſurvived the deviſor, ſo that the remainder and intereſt was veſted in *her*, although it was not executed in poſſeſſion until after her death, by the death of the tenant in tail without iſſue; ſo that afterwards it *went* in deſcent to her heirs, and not by proximity of blood to the deviſor; ſo that he held that the eldeſt daughter ſhould take but an equal portion with her ſiſters; but in this caſe it appeared upon the record that all the daughters died without iſſue *ſcil.* the eldeſt, to whom no eſtate was given by name in the will; and the two daughters, who had expreſs eſtates by it; and he held, that this expreſs eſtate excluded them, and their iſſues from

The reaſon why the eldeſt ſon is preferred to all others by deſcent.

from taking any other estate by implication; and so all fell upon the eldest daughter; to which *Chamberlaine* agreed; but *Houghton* denied this reason, because this did not exclude their issue; so that they all agreed that the issue of the eldest daughter should have the whole of the land, and commanded that judgment should be entered accordingly for the plaintiff: but the counsel for the defendant shewed, that the special verdict was uncertain in point of title, upon which no judgment could be given: for they found that *Joan* the eldest daughter had issue *John* and *William*, and that *William clamando* as *proximus de sanguine* of the devisor, entered with his brother: and did not find that *John* was the eldest son or heir to *Joan*, and in point of title it shall not be intended that he is, although that he is first named; but when it is said that *William clamando intravit*, this increases the uncertainty, and the Court cannot ground their judgment upon an intendment who is heir, and that the remainder vested in *Joan*, and this is conveyed by descent to her heir, which doth not, by this verdict, appear to be the plaintiff; and so he cannot have judgment; and for this reason the Court would not give judgment; but awarded a *venire facias de novo:* but they declared their opinion upon the matter of law.

Special verdict finds plaintiff had issue two sons, but does not find which is eldest or heir.

Uncertainty.

Venire facias de novo.

Young v. Englefield, T. 21 Jac. B. R. Palm. 378.

Variance between the roll and the nisi prius record.

In *trespass*, the plaintiff alledged the trespass in two acres, which abut upon *Gray's-Inn-Lane*; but the *nisi prius* record recited the abuttals upon *Graves-Inn-Lane*; and for this variance between the *nisi prius* and record here, *Crook* moved to have a new *distringas*; for that what had been done at the assizes was void,

void, and without warrant; and he cited a precedent in this court, *Trin.* 9 *Jac. Rot.* 430. between *Farthing* and *Dupper*, that the *nisi prius* for variance from the record here, in this that the *nisi prius* recited 6 *menses*, where the record was 6 *septimanas*, was adjudged without warrant and void. And inasmuch as it appeared that this precedent was upon deliberation, it was ruled by *Lea*, C. J. and *Dodderidge*, J. that the plaintiff should have a new *distringas*, although he was nonsuited at *nisi prius*; for this was without warrant and so no *nonsuit*: but if original process or other process be erroneous, yet it is a record: but the *nisi prius* was but a transcript from the record. *Houghton*, J. held, that it was a record, although erroneous; and said that it was against the precedent: but it was resolved as above according to the precedent.

If a verdict be imperfect, it shall not be rectified by the same jury, but a *venire de novo* must issue. R. 2 Cro. 210.

If there are several issues, and a verdict good as to one, and imperfect as to others, a *venire facias* goes to all. R. 2 Rol. 722. l. 45.

So, in an action against several, if the verdict is good as to some, imperfect as to others, there shall be a *venire facias de novo* as to all, and a defendant found not guilty, may afterwards be found guilty. R. 2 Rol. 722. l. 35. 2 Cro. 627.

So, if there be a demurrer to part, and issue for part, and the verdict does not find damages for the matter in the demurrer, it is wholly void. Dub. 2 Rol. 723. l. 5.

But it may be aided by a release of damages on the demurrer, or a *non pros.* R. 1 Salk. 246.

Vide as to imperfect verdicts, 5 *Com. Dig.* 142, &c. a great variety of cases.

Rex v. John Huggins, Esq. M. 4 G. 2. B. R. 2 Stra. 882. Ld. Raym. 1574.
A special verdict in murder and judgment for the defendant, after debate upon the uncertainty of the verdict, and whether the prisoner should be discharged, or a venire facias de novo awarded.

The defendant stood indicted before the Justices of *Oyer* and *Terminer* at the *Old Bailey*, and the indictment set forth that *John Huggins*, 1 *October*, 12 *Geo.* 1. and long before, and until 1 *January* following, was warden of the *Fleet*, and had the care and custody of the prisoners committed thither. That *James Barnes* was his servant, employed by him in taking care of the prisoners. That *Barnes* being a person of a cruel nature and disposition, did, 1 *November*, 12 *Geo.* 1. make an assault upon *Edward Arne*, then a prisoner in the *Fleet*, and feloniously took him against his will, and carried him to a new-built room in the prison, where he kept him six weeks without fire, chamber-pot, or close-stool, the walls being damp and unwholesome, and the room built over the common-sewer. That at the time of such imprisonment *Barnes* and *Huggins* knew the room to be as before described. That *Arne*, by reason of his imprisonment in the said room, sickened, and by duress thereof died; and that *Huggins* was aiding and abetting *Barnes* in committing the said felony and murder.

The defendant *Huggins* only was taken, and having pleaded Not guilty, the Jury find this special verdict.

That Queen *Anne*, by letters patent under the great seal, dated 22 *July*, in the 12th year of her reign, constituted *Huggins* warden of the *Fleet* during his life, to be executed by himself, or his sufficient deputy or deputies. That from the date of the letters patent until

1 *January* 12 *Geo.* 1. the defendant was warden, and *Thomas Gibbon* all the ſaid time his deputy; and acted as ſuch. That *James Barnes* was the ſervant of *Gibbon*, and acted in the care of the priſoners, and particularly of *Edward Arne*. That *Barnes*, 7 *September* 12 *Geo.* 1. aſſaulted *Arne*, and feloniouſly put him into a room (which is found to be as deſcribed in the indictment) and kept him there forty-four days without fire, chamber-pot, or cloſe-ſtool, or ſuch like utenſil. That *Barnes* knew the room to be ſituate as in the indictment, and that it was unwholeſome; and that for fifteen days at leaſt before the death of *Arne*, *Huggins* knew the condition of the room, but whether he knew it before, *penitus ignorant*. That by dureſs of the impriſonment, *Arne* 10 *September* became ſick, and languiſhed till 20 *October* following, upon which day he died by dureſs of the ſaid impriſonment in the ſaid room. That fifteen days at leaſt before his death, *Huggins* was once preſent at the ſaid priſon, and ſaw *Arne* under dureſs of the ſaid impriſonment, and turned away, and at the ſame time he ſo turned away, *Barnes* ſhut the door, and *Arne* continued in the room till he died. That during the time that *Gibbon* was deputy, *Huggins* ſometimes acted as warden. But whether he be guilty of the murder of *Edward Arne*, is the doubt of the Jury; on which they pray the advice of the Court; *et ſi pro Rege, pro Rege; et ſi pro defendente, pro defendente.*

This verdict was removed at the prayer of Mr. Attorney into B. R. and there argued by Mr. *Willes* and Serjeant *Eyre*; after which it was argued at *Serjeant's-Inn Hall*, in *Chancery Lane*, before all the Judges, by Serjeant *Cheſhyre*,

hyre, Mr. Attorney, Mr. Solicitor, and Mr. *Willes*, for the king; and by Serjeant *Darnall*, Serjeant *Eyre*, Serjeant *Hawkins*, Mr. *Peere Williams*, Mr. *Strange*, and Mr. *Forster*, for the prisoner. But as every thing insisted on by either side is taken notice of in the opinion delivered by the Chief Justice, it will not be necessary to state the arguments of counsel.

Raymond, Chief Justice, after stating the heads of the special verdict, went on as follows. The general question in this case is, Whether, upon the facts as found in the verdict, the prisoner at the bar is guilty of the murder of *Edward Arne*.

For that purpose it will be necessary to consider these two things: 1. What offence it is in *James Barnes*; and, 2. Whether the prisoner is guilty in the same degree.

And as to the first point, we are all of opinion, that if *Barnes* was now before the Court, and the facts, as found in this verdict, were found against him; he would undoubtedly be guilty of murder. It is certain there is no particular way of killing another, that is necessary to constitute murder; but the committing of murder is as various as the several ways of putting an end to life. In the case of a prisoner there is no occasion for an actual stroke: the restraining him by force, and killing him by ill usage, is enough to constitute this offence. All the authors who speak of this species of murder, describe it by a general expression *per dure garde de ses gardens*. The duty of a gaoler is not to punish, but confine the party, for the single purpose of his being forth-coming to answer a legal charge or demand. *Fleta* 38. In this case *Barnes* has certainly exceed-

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ed his duty: he has been guilty of a breach of that truſt, which the law has repoſed in him, and is anſwerable for all the conſequences of it.

Another conſideration to make it murder is, that it is a deliberate act, of long continuance, and of great cruelty. It is likewiſe accompanied with force, againſt the conſent of the party. On all which accounts the law implies malice. Had he therefore been before the Court, there would have been no difficulty in adjudging it murder with regard to him.

2. Having thus determined what offence it would be in *Barnes*, let us now conſider how it ſtands with regard to the priſoner at the bar. And though the indictment has charged him equally with the other, yet we think the verdict has made a wide difference between them. The indictment charges *Barnes* to be his ſervant, but the verdict finds he was the ſervant of *Gibbon*. The whole charge in the verdict againſt the priſoner is, that for fifteen days before *Arne*'s death, he knew what ſort of a room he was in: that he once ſaw him under the dureſs of impriſonment that *Barnes* had put him in: and that during the time *Gibbon* was deputy, *Huggins* ſometimes acted as warden.

But notwithſtanding theſe circumſtances which are found againſt the priſoner at the bar, we are all of opinion he is not guilty of murder.

It is a point not to be diſputed, but that in criminal caſes the principal is not anſwerable for the act of the deputy, as he is in civil caſes: they muſt each anſwer for their own acts, and ſtand or fall by their own behaviour. All the authors that treat of criminal proceedings, proceed on the foundation of this diſtinction;

 that

that to affect the ſuperior by the act of the deputy, there muſt be the command of the ſuperior, which is not found in this caſe.

The dureſs in this caſe conſiſted in the firſt taking him against his conſent, and putting him in that room, and the keeping him there ſo long without neceſſaries, which was the occaſion of his death. Now none of theſe circumſtances are found as againſt the priſoner. The Jury does not ſay he directed his being put into the room, that he knew how long he had been there, that he was without the neceſſaries in the indictment, or was ever kept there after the time the priſoner ſaw him, which was fifteen days before his death. And as theſe are circumſtances found againſt *Barnes*, and not againſt *Huggins*; and as in theſe caſes the Court is never to intend any thing, but muſt found their judgment on the facts as ſtated in the ſpecial verdict, and on them only; there can be no colour to think one equally guilty with the other. The only circumſtance relied upon to ſupply all this is, the priſoner's being once at the priſon where he ſaw the deceaſed under the dureſs, and turned away. But ſurely the bare being preſent can never amount to an aiding and abetting. He ſaw him there, it is true; but does that infer he knew how it was occaſioned, or conſented to the continuance of it? It is very material in this caſe, that the dureſs by which this unfortunate man came to his end, could not be known by a bare looking in upon him: he could not know he was there againſt his conſent, he could not by ſeeing him know the length of his confinement, or how long he had been without the decent neceſſaries of life: and it is likewiſe material, that no application is found to have

been

been made to the defendant, which perhaps might have altered the caſe.

Theſe circumſtances, taking them altogether, are a very ſlender evidence of a conſent in the priſoner to the dureſs: though this I muſt ſay, that were they ever ſo ſtrong an evidence of conſent, they will not be ſufficient for us to ground a judgment upon: we are to determine upon facts, and not on evidence of facts; ſo is *Kelyng* 78, 111, where it is found, that *Plummer* diſcharged the fuzee, but not that he diſcharged it *againſt* the king's officers; and the Court could not take it that he did. It would be the moſt dangerous thing in the world, if we ſhould once give into the doctrine of inferring facts from evidence; which is the proper buſineſs of a jury, and not of the court.

But it is objected, that though the priſoner had made a deputy, he had ſtill the inſpection of the gaol; and for the time he was there, the power of the deputy ceaſed. To this I anſwer, that there is no caſe in law which proves, that the accidental preſence of the principal amounts to a revocation; and in reaſon it ought to be conſtrued ſuch a coming, as ſhews he intended to take upon himſelf the execution of the office. If a diſſeiſee comes to dine with the diſſeiſor, that will not amount to an entry.

It is likewiſe inſiſted on, that in many caſes a perſon who is abſent when the murder is committed, may nevertheleſs be an aider and abetter; and the caſes were put of laying poiſon, putting a child in a hog-ſtye, covering it with leaves, or leaving a ſick man in the cold, by which he dies, which are all to be met with in *Kelyng*. Now as to theſe caſes I

must observe, that in every one of them the person absent did the act which was the occasion of death; whereas here the act is found to have been done by another.

It was further observed upon this head of absence, that in *Staunf.* 17. *Cromp.* 24. *b.* the case is ruled to be murder, of letting a mischievous beast go abroad, which happens to kill a man. But surely that is laid down too general in those books: and it would be very hard, if a man takes a reasonable care to keep up the beast, that he should be answerable, if the beast should break out without his knowledge or consent.

There is but one thing more that was pressed by the king's counsel, *viz.* that since it was determined in *Oneby*'s case, that it is not necessary for the Jury to find malice, why is it more necessary to find the prisoner's consent? To this I answer, that malice is matter of law arising from a legal construction of the act; and from the act of the party the law has always construed, whether there was malice express or implied: but consent is an act of the mind; a sudden killing is construed to be malicious, though there is no time for any consent. These are the reasons which induce us to determine, that upon this verdict the prisoner at the bar is Not guilty of the murder of *Edward Arne*.

But then upon the argument of this cause a difficulty arose, what the Court should do in this case, supposing the verdict to be too incertain to found any judgment upon. It will therefore be necessary further to consider: 1. Whether this is an incertain verdict; and, 2. Supposing it is, whether we are to dis-

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charge the prisoner, or award a *venire facias de novo.*

Now as to the last point, it is observable, that no instance could be produced where, in a criminal case, it was ever done for a fault in the verdict itself. *Arundel's* case in 6 *Co.* was for a fault in the jury process, and in the case cited of *Hil.* 8 *H.* 7. *Ro.* 3. there was no verdict, the Judge discharged the Jury, and would not take their verdict, because it was put into their hands in writing as they stood at the bar.

And in the case of Mr. *Keate*, 5 *Mod.* 287. *Skinner*, 666. though the verdict was so incertain, that it was impracticable to determine either way, for want of finding who struck first; yet *Holt*, C. J. was so averse to a *venire facias de novo*, that he himself took an exception, that quashed the indictment, in order to put it into a proper way of being tried over again.

But whatever may be the determination of the Court, when that point comes properly before us, it is unnecessary for us now to consider; because as to the other point we are all of opinion, that this verdict is not incertain.

There is no incertainty as to the facts that are found: the only fault is, that there are not such facts found as will amount to murder. The consequence of which is, that the defendant is not guilty of murder; and it would be endless to send it back to a jury, till they find facts enough to make it murder; besides its being contrary to law, in exposing a man to a second hazard of his life.

It would have been a circumstance very material in the case of *Plummer*, *Kelyng* 111. to

have found, that the fuzee was discharged at the king's officers; but the Jury were silent as to that, and the Court said they could not take the fact to be so, upon bare evidence of the fact; and proceeded to give judgment, as if the fuzee had not been discharged against the king's officers, without sending it back to the Jury to find it positively one way or the other.

So in the case of *Messenger et al'* (*Kelyng*, 79.) who were indicted for high treason in assembling and pulling down bawdy-houses. The verdict was silent as to *Green* and *Bedell*, whether they were aiding and assisting; and this (says *Kelyng*) being a matter of fact, which ought to be expressly found by the Jury, and not be left to the Court upon any colourable implication from their being present; they two were discharged, without sending it back to the Jury for their further opinion as to the fact.

In *Kelyng*, 66. on a special verdict, it was found that *Thompson* and his wife were fighting, and *Dawes*, endeavouring to part them, was killed by *Thompson*; and it not being found that *Thompson* knew *Dawes* intended only to part them, it was held man-slaughter, without sending it back to the Jury to be certified of his knowledge.

These are cases directly in point as to this head; and I must observe, that *Plummer*'s case was after the case of *Keate*, wherein *Holt*, *Chief Justice*, had had this point under his consideration.

This verdict therefore being sufficient to found a judgment upon, our judgment is, that the prisoner is Not Guilty, and therefore he must be discharged.

This

This was an action on the case for several sets of scandalous words spoken of plaintiff by defendant. Plaintiff on the trial obtained a verdict, and the damages were found entire, though some of the words were not actionable. *Belfield* moved for a *venire facias de novo* on payment of costs, that plaintiff might sever his damages according to an ancient rule of court; which was granted by the Court.—*Eyre* for plaintiff.

Anger v. Wilkins, M. 6 G. 2, Barnes, 478.
General verdict for plaintiff in action for words: some not actionable, venire de novo that damages might be severed.

I have given this case because reported by Mr. *Barnes*; but I doubt the law, and do not know to what rule the author alludes.

To a *mandamus* to restore the plaintiff to the office of alderman, it was returned, that at an assembly held such a day the plaintiff was, for being absent three years, removed. And upon a traverse of every part of the return, a special verdict was found as to some points which are not necessary to be stated, inasmuch as no opinion was given upon any but one, which was this, The removal was not upon a charter-day, so a summons of an assembly was necessary. The mayor gave orders for a summons of all the members, but the serjeant being informed, and believing that one of the aldermen was out of summons, neglected to give him notice, though he had a house and family in the town, and accordingly returned him out of summons. And upon this part of the case the Court was of opinion, it was not a regular assembly, for every member should be summoned; and he has a right to debate as well as vote. And this point has been so often settled, that it is not now to be made a question. And by the same reason that the omitting to summons one man may be

Kynaston v. the Mayor, Aldermen, and Assistants of Shrewsbury, T. 9 Geo. 2. 2 Stra 1051.
If one member be omitted to be summoned to a corporate assembly, the act is void.

be excused, the omission of a greater number may be passed over.

Whereupon a rule was pronounced for a peremptory *mandamus*; and the plaintiff prepared to enter up a judgment for his damages and costs, when it was found, that at the trial there was an omission of damages, and consequently there could be no judgment for costs.

Where on trying a traverse in a return, no damages are given, this cannot be supplied by writ of inquiry. 2 Stra. 1021.

To supply this defect, the Court was moved for a writ of inquiry; and *Cro. Car.* 143. and the cases of *quare impedit* and dower were cited, where damages not being the gist of the action, the want of them may be supplied by writ of inquiry.

To this it was answered and resolved by the Court, that the rule laid down in *Cheney*'s case, 10 *Co.* is right, that where the Jury are charged with a matter for which an attaint will lie if they give a false verdict, it can never be supplied by writ of inquiry, but must be by *venire facias de novo*, and so is *Salk.* 205. 5 *Mod.* 113.

By the statute 9 *Ann. c.* 20. this traverse is given in the room of an action for a false return: and as there it cannot be said the damages are collateral, so neither can it here; for they are consequent upon the issue, and as much within the charge of the Jury. No one can doubt, but that if in an action for a false return, damages had not been given, they could not be supplied by a writ of inquiry. All the cases of replevins upon the statute 17 *Car.* 2. *c.* 7. are in point as to that. 1 *Sid.* 380. *Raym.* 170. 1 *Ven.* 40. 2 *Keb.* 408. *Tucker* v. *Stevens in C.B. Trin.* 6 *Geo.* 1. Here it ought to be by the same jury, and there is no difference between a special and a general verdict. The plaintiff's counsel will therefore consider what to do, or pray.

And

And a writ of error being then depending in parliament, it was not thought adviseable to pray a *venire facias de novo*, but to consider of some form of a judgment to be entered up, in order to carry to the Lords. And the judgment that was entered was, " It is considered " by the Court, that the return is not suffi- " cient in law to bar or preclude the said " *Corbet Kynaston* from being restored to the " said place or office of one of the aldermen " of the said town, and that the said return " for the reasons aforesaid be disallowed and " quashed."

And thereupon the cause was argued at the bar of the House of Lords, where no opinion was given upon the points of the special verdict, but a judgment pronounced for remitting the record to *B. R.* who were directed to award a *venire facias de novo*. There were three Judges present, *C. J. Willes*, *J. Denton*, and *B. Thompson*, to whom two questions were put.

1. Whether there being no damages, any judgment could be entered? To which they answered, that there could not; and declared that no waiver or *remittit.* of damages below could have set this right, for then there would be nothing to give judgment for, the entry being only a judgment for damages and costs, and the peremptory *mandamus* goes by rule for him, for whom judgment is given, which are the words of the statute.

The second question put to the Judges was, Whether, as no damages are given, the plaintiffs in error would not be subject to an action, which would be a double vexation? As to this their opinion was, that an action might be brought, the statute only taking it away

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in case damages are given upon trying the traverse.

The judgment was reversed, and a *venire facias de novo* directed to be awarded by *B. R.*

Street v. Hopkinson, et al' Mic. 10 G. 2. 2 Stra. 1055. Upon pleading the statute of limitations in error, the judgment is to bar the plaintiff of his writ. 1 Stra. 127. 439. 683.

A writ of error was brought, *tam in redditione judicii* against the testator, *quam in adjudicatione executionis* against the executors: as to the principal judgment, the defendant in error pleaded the statute of limitations, and prayed that the judgment be affirmed. As to the award of execution, *in nullo est erratum* was pleaded. And that appeared to be in a *scire facias* against two executors, one of whom pleaded *ne unques executor*, and the other pleaded payment by the testator: and upon this plea there was a verdict against it, but no verdict as to the other, and then follows the award of execution.

As to the principal judgment, the only doubt was, whether, as the defendant in error had concluded with a prayer that the judgment be affirmed, the Court could give the proper judgment, which was, that the plaintiffs be barred of their writ of error.

But the Court held, that they were not bound by the prayer of an improper judgment, and therefore pronounced the rule, that the plaintiff in error should be barred.

Vide ante. There cannot be a venire facias de novo awarded on error. Vide post. Grant v. Astle, and Parker v. Wells, contra.

And as to the award of execution, they were of opinion it was wrong, and that not being in the same court, they could not award a *venire facias de novo*; and this being a distinct judgment, might be reversed without affecting the other. And it was reversed accordingly. The cases cited upon the first point were *Show.* 50. *Carth.* 369, 370. *Lutw.* 1386. 3 *Lev.* 58. And on the second point, 1 *Roll. Abr.* 803. 1 *Inst.* 127. 3 *Salk.* 372. *Cattle v. Andrews*,

Andrews, Hil. 5 *W.* & *M. rot* 826. *in B. R. Cumb.* 259. *Salk.* 4. 363.

Bartlett v. Spooner, E. 24 Geo. 2. Barnes 461.

Not guilty in trespass and two justifications. Verdict for defendant on the two first issues, not any proof or verdict as to the third issue. Motion for venire de novo as to the third issue, but refused.

This was an action of trespass, to which defendant, by leave of the Court, had pleaded three pleas, *viz. Not guilty*, and two several *justifications*. On the trial, defendant proved his second plea, to the satisfaction of the Court, and obtained a verdict on the first and second issues; but as to the third issue, no proof was gone into, nor any verdict found relating to it. *Belfield*, for plaintiff, objected, that the verdict was incomplete, imperfect, and uncertain, nothing being found as to a material fact put in issue; and therefore, as to the third issue, *a venire facias de novo* ought to be awarded. On shewing cause, *Prime*, for defendant, observed, that by the first plea, (not guilty) the whole is put in issue; that, by the second plea, the whole trespass is covered, and therefore the verdict is complete. It is found thereby, that plaintiff has no cause of action, and the Judge who tried the cause did not think it needful to go farther. As plaintiff has no cause of action, he can have no damages. Contingent damages in case of issue and demurrer, and issue tried before argument, are not necessary to be found at the trial on plaintiff's verdict, but may be afterwards supplied, if judgment for plaintiff on the demurrer.

Per Cur'. Here is enough found for the Court to give judgment upon. No *venire facias de novo* ought to issue. It was not the business of defendant, but of plaintiff, to have the third issue determined, if he imagined that thereby he might be intitled to costs, or any other advantage.—The rule discharged.

N. B.

N. B. Plaintiff gave no evidence on the Not Guilty.

Crowder v. Rocke, T. 2 G. 3. 2 Wilf. 144.

If it appears on the face of the *jurata*, that the caufe was tried after the day of *nifi prius* mentioned therein; there muft be a *venire facias de novo* awarded, for the *hab. corpora* and *jurata* cannot in this cafe be amended.

Eichorne v. Lemartre, H. 8 G. 3. 2 Wilf. 367.

Wherever attaint would lie, writ of inquiry cannot be awarded to affefs damages, but *venire de novo* muft go; fo, if iffue is joined in abatement, and verdict for plaintiff.

Drage v. Brayet, P. 8 G. 3. 2 Wilf. 377.

In debt for a penalty of £.500 on articles not to cut trees, *&c.* on penalty, *&c.* if there is verdict for plaintiff, that defendant owes the debt and one fhilling damages, a *venire facias de novo* fhall go, for the Jury fhould have affeffed the real damages on the breaches affigned, and plaintiff cannot take a verdict for the whole debt by 8 and 9 *W.* 3. *c.* 10.

Grant v. Aftle, T. 21 G. 3. Doug. 696. B. R. One fine cannot be affeffed on the admiffion to feveral copyhold tenements. If any count in the declaration ftate one fine, although the others ftate feveral, and there are entire damages, and judgment for the plaintiff, it is error. A court of error may award a venire de novo.

This was a writ of error from the Court of *Common Pleas*, on an action of *affumpfit*, by *Aftle*, as lord of the manor of Great *Tay*, in the county of *Effex*, againft *Grant*, for the fines affeffed by the lord, on *Grant*'s admiffion to eight different cuftomary tenements. The declaration confifted of three counts. The firft ftated, that *Aftle* was lord of the manor; that the eight tenements (enumerating and defcribing them particularly with their names, and the names of the different parts of which each confifted, where there were different parts of the fame tenement with diftinct names, and the number of acres which each tenement, or its different parts, by eftimation, contained)

were, and for time immemorial had been, parcel of the ſaid manor, and cuſtomary tenements of the ſaid manor, *demiſed and demiſeable* by copy of court roll of the ſaid manor, by the lord of the ſaid manor, or by his ſteward, or deputy ſteward of the courts of the ſame manor for the time being, to any perſon or perſons intitled to take the ſame in fee-ſimple, or otherwiſe, at the will of the lord, according to the cuſtom of the ſaid manor; and that within the manor there was a cuſtom, that every cuſtomary tenant, upon his admiſſion to any cuſtomary tenement, parcel of the manor, by the lord or his ſteward, or deputy ſteward, ſhould pay to the lord a *reaſonable ſum, to be aſſeſſed by him*, or his ſteward, or deputy ſteward, for a fine, for ſuch his admiſſion to ſuch cuſtomary tenement. It then ſtated eight ſeveral admiſſions of *Grant*, by the deputy ſteward, to each of the eight cuſtomary tenements reſpectively; that the *firſt* was of a large annual value, *viz.* of the annual value of £. 23. 8*s*. 9*d*. and that *Aſtle*, at the time of admiſſion of *Grant* to this firſt tenement, did aſſeſs or appoint the ſum of £. 46. 17*s*. 6*d*. as and for a fine for his admiſſion to that tenement, to be paid by *Grant to Aſtle*, at the meſſuage called the *Guildhall*, in Great *Tay aforeſaid*, being the place where the courts for the manor were uſually holden, at twelve o'clock, *A. M.* on *Thurſday* the 20th of *Auguſt* then next enſuing; that the ſaid £. 46. 17*s*. 6*d*. was *a reaſonable ſum* of money to have been paid to *Aſtle* by *Grant*, for his admiſſion to that tenement; and then an *aſſumpſit* by *Grant* for the £. 46. 17*s*. 6*d*. Then ſimilar ſeparate allegations with regard to the ſeveral fines of

£. 4.

£.4. 10*s.*; £.2. 12*s.* 6*d.*; £.11. 18*s.*; £.3.; £.1. 10*s.*; £.7. 10*s.*; and £.24. respectively, for the seven other customary tenements (1). The second count stated, that, " whereas *Grant* afterwards, *to wit*, &c. was indebted to *Astle* in the further sum of £.98. 18*s.* 4*d.* for *a certain other fine* due and of right payable from the said *Grant* to the said *Astle*, as lord of the manor of Great *Tey*, for the said *Astle*'s admission of the said *Grant*, at his special instance and request *to certain other customary tenements*, parcel of the said manor, to be held by the said *Grant* and his heirs, of the lord of the said manor, at the will of the lord, according to the custom of the said manor, by *certain rents, services, and customs* therefore formerly due, and of right accustomed; and then an *assumpsit* for the said last-mentioned sum. The third count was for £.100. money paid, laid out and expended. *Grant* pleaded the general issue, paying, at the same time £.84. 5*s.* 8*d.* into Court; and the cause came on to be tried before Ashhurst, *Justice*, at the assizes for the county of *Essex*, when a general verdict was found for *Astle*, with £.98. 18*s.* 4*d.* damages, subject to the opinion of the Court of *Common Pleas*, on a case reserved. That court having decided in favor of *Astle*, he remitted the £.84. 5*s.* 8*d.* upon the record, and took judgment for the difference. *Grant* then brought this writ of error, and (besides several on the first count, which, not having been insisted on, I omit) assigned the following errors on the second count: 1. That no title was alledged, nor did appear to be vested in *Astle*, to entitle him to a fine upon the admission of *Grant*; whereas, by the law of the land,

(1) Some of the counsel spoke of what is here called the first count, and was so described in the assignment of errors, as consisting of eight counts, there being eight separate assumpsits alledged.

land, a title ought to have been ſtated, whereby he claimed the ſaid fine. 2. That no cuſtom or preſcription was therein ſtated or alledged, whereby ſuch a fine as was thereby claimed could ariſe, or become payable. 3. That it appeared, "*that one groſs ſum had been aſſeſſed,* "*and was claimed as a fine for divers diſtinct* "*and ſeparate cuſtomary tenements*; whereas, "by the law of the land, ſeparate and diſtinct "fines ought to be ſet and aſſeſſed upon each "ſeveral and reſpective tenement."

Wood for the plaintiff in error,—*Law* for the defendant.

Wood inſiſted, that the ſecond count was bad, and that, if ſo, as the verdict was general, the judgment muſt be reverſed: 1. In order to ſupport this count, he ſaid, a great many circumſtances, eſſential to intitle the plaintiff to maintain his action, muſt be preſumed, and ſupplied by intendment. 1. There is no allegation of any cuſtom to take fines, and, without ſuch a ſpecial cuſtom, no fine is payable. 2. It is not alledged that the fine was reaſonable. 3. It is not ſtated how it was aſſeſſed. 4. Nor how appointed to be paid. 5. Nor that the defendant had notice before the action brought. 6. It is not ſufficiently ſhewn, that the tenements are copyhold, for, they are not alledged to have been *demiſed and demiſable* from time immemorial, &c. They are indeed called cuſtomary, but *that* they may be, and yet not copyhold, nor ſubject to the payment of fines upon admiſſion. It is not denied, that *indebitatus aſſumpſit* will lie for a copyhold fine (2), but all the circumſtances juſt mentioned are neceſſary to raiſe the *aſſumpſit*, and there is no caſe in which the court has preſumed ſo many things even after verdict.

(2) It was ſolemnly decided, that aſſumpſit will lie in the caſe of Shuttleworth

verdict.--Upon this head of objection he cited *Moore* v. *Lewis* (a), which was an action of *assumpsit*, and the declaration contained two counts; in the first, the consideration of the *assumpsit* was, that the plaintiff had done the defendant *multum et gratissimum beneficium*; in the second, that he had done him *multa beneficia*. There was a general verdict; and motion in arrest of judgment, because neither of the considerations were sufficient, especially not the last, for that some particular service ought to have been alledged; and the Court held clearly, that nothing being particularly expressed in the consideration of the second promise, and entire damages being given, the plaintiff could not have judgment. He also cited *Elkin* v. *Wastell* (b), where, upon a writ of error, the Court agreed that land could not be *intended* to be copyhold, but must be so alledged. But, 2. He contended that there was another objection which was decisive, *viz. that* assigned as the third error on the second count. He said, he took it to be quite settled, that there cannot be one gross fine for several distinct tenements; and it was impossible to read this count, and not to see that the fine was for divers tenements. The words are, "*a certain* "*other fine*," and "*certain other customary te-* "*nements*;" not, "*a certain other customary* "*tenement*." This must mean more than one tenement. It goes on farther, and states them to be held by "*certain rents, services, and cus-* "*toms*;" and, if there is a plurality of rents and services, there must also be a plurality of holdings. In the first count, the words customary tenements, are manifestly used to express several distinct tenements, and there cannot be a better way of explaining the meaning of

v. Garnet, cited Cowp. p. 702. by the opinion of Dolben, Gregory, and Eyres, Justices, against that of Holt, Chief Justice.

(a) B. R. E. 21 Car. 2. 1 Ventr. 27.

(b) B. R. M. 14 Jac. 1. 3 Bulstr. 230.

of one part of the declaration, than by comparing it with the other part. On this head he relied on *Hobart* v. *Hammond* (c), where it was exprefsly refolved, that, when a copyholder has feveral lands held by feveral fervices, by copy, there the lord ought to affefs and demand the fines feverally for every parcel which is fo feverally held; *Taverner* v. *Cromwell* (d), and *Hitch* v. *Wallis*, before BLACKSTONE, *Juftice*, at the Lent *affizes* for the county of *Cambridge*, 17 *Geo.* 3.

(c) B. R. M. 42 et 43 Eliz. 4 Co. 27 b. S.C. Moore 622. and Cro. Eliz. 779. by the name of Dalton v. Hammond.

(d) B. R. T. 26 Eliz. 4 Co. 27. a.

Lord MANSFIELD defired *Law* to confine himfelf to *Wood*'s fecond objection.

Upon that point, *Law* faid, it ought to be confidered, that, here, the objection was made after verdict, not on a demurrer, or at the trial, as in the cafe of *Hitch* v. *Wallis*, in which cafe the plaintiff would have given evidence of one grofs confolidated fine for divers tenements. The Court, in this cafe, will give to the word "*tenements*," fuch a fenfe, if poffible, as will fupport, rather than overturn the count. "Tenements," as defined in *Coke Littleton* (a), means any "corporate inheritances," or any "inheritances iffuing out of thofe." It may ftand for *meffuages and lands*, and, if you tranflate the fign into the thing, the declaration will run "certain other cuftomary "meffuages and lands," which would certainly be fufficient, as the fine may be fuppofed to have been affeffed for one copyhold eftate compofed of different parts, as houfes, arable grounds, &c. As to the words, "rents, "fervices, &c." in the plural, one copyhold eftate may be held by feveral different forts of rents and fervices, to be paid and performed at different times. In *Shuttleworth* v. *Gar-*

(a) Co. Litt. 19 b.

net, as reported in several different books (b), the declaration was on a general *indebitatus assumpsit* for a *fine*, payable on the death of every lord, and assessed on the defendant, as tenant *quorundam custumariorum tenementorum* (c), and upon a motion in arrest of judgment, it was determined that the action lay (3). So in the case of *The Mayor of Exeter* v. *Trimlet*, (d) where on a general demurrer to an action of *assumpsit* for petty customs, in which the declaration contained two counts, the first setting out a prescriptive right, and the second being a general *indebitatus assumpsit* for a certain sum due for petty customs,—the demurrer was over-ruled, and Willes, *Chief Justice*, in delivering the judgment of the Court, said, they gave no *positive* opinion as to the *second* count, but inclined to think it was well enough upon a general demurrer, and that, if the defendant had pleaded *non assumpsit*, the plaintiff at the trial would have been obliged to shew his right to the petty customs. Surely the plaintiff here, is intitled to, at least, as much advantage after verdict, whatever might have been the case upon a special demurrer. There, it is said, the plaintiff must have *proved* his right. Here, the Court will presume, that the right was proved, and no judge at *nisi prius* would have suffered evidence to be produced of one general consolidated fine for several copyholds: it must be intended that the proof was either of one estate, or of several assessments. If the Court should think "tenements" in the plural, cannot be interpreted to mean one estate composed of different parts, they will reject the letter *s*, rather than turn the plain-

tiff

(b) B. R. M. 1 W. et M. Carth. 90. 3 Mod. 239. 3 Lev. 261. 1 Show. 35. Comb. 151.

(c) Carth. 91.

(3) The present question does not appear to have been made in that case; the only point argued being, whether assumpsit was a proper form of action. Vide Cowp. p. 700. note (3).

(d) C. B. T. 32 & 33 G. 2. 2 Wils. 95.

tiff round. The word "parcel" may assist to shew that only one copyhold was meant.

Lord MANSFIELD.—I have exceedingly lamented, that ever so inconvenient and ill-founded a rule should have been established, as that, where there are several counts, entire damages, and one count is bad, and the others not, this shall be fatal; upon the fictitious reasoning, that the Jury has assessed damages on all, although they in truth never thought of the different counts, but the verdict was so taken, from the inadvertence of counsel in the hurry of *nisi prius*. And, what makes this rule appear more absurd, is, that it does not hold in the case of criminal prosecutions; for, when there is a general verdict of *Guilty* on an indictment consisting of several counts, if any one of them is good, that is held to be sufficient. But in civil cases the rule is now settled, and we have gone as far as we can, by allowing verdicts in such cases to be amended by the judges notes (a). *That* might have been done in this instance in an earlier stage of the proceeding, but cannot now after judgment.

(a) Eddowes v. Hopkins, ante ix. (10.)

BULLER, *Justice*.—The Court may grant a *venire de novo*. A good cause of action is shewn in the first count; and that it is true, appears by the verdict; but the plaintiff has also laid damages assessed to him on a count in which he has not shewn any cause of action. The Court, under these circumstances, may send the case back to have damages assessed only on that count, on which, in point of law, he is intitled to recover.

The Court then said, there was no doubt

but a *venire de novo* might be granted by a court of error: that it had been done by the House of Lords, and was not a new practice, for upon an enquiry made by this Court on a late case from *Ireland*, a great many instances had been found.

A *venire de novo* awarded (4).

Upon

(4) The cause came on to be tried, on the *venire de novo*, before *Ashhurst*, Justice, at the *Lent* assizes for the county of *Essex*, 22 *Geo.* 3. when the Jury, upon the evidence, thought that the sum of £. 46. 17 *s.* 6*d.* stated to have been assessed as a fine on the admission to the first of the eight tenements, exceeded two years value, and that the fine ought only to have been £. 46. 4 *s.* 3*d.* *Ashhurst*, Justice, was of opinion, that the plaintiff could not have a verdict for that smaller sum, but must recover either to the exact amount of the fine declared upon, or not at all. The plaintiff's counsel, however, insisting strongly that he might recover whatever the Jury should find the two years value to be, a verdict was found for the plaintiff, by consent, on the first count for two years value, with liberty to enter the verdict for the defendant, if the Court should think the plaintiff was bound to prove the exact sum laid.

In *Easter Term* 22 *G.* 3. this question was argued by *Rous*, *Erskine*, *B. Hunter*, and *Law*, for the plaintiff (*Astle*); and *Peckham* and *Mingay* for the defendant; and in the same term, on *Saturday* the 11th of *May*, Lord MANSFIELD delivered the opinion of the Court in favour of the defendant, as follows:

Lord *Mansfield*.—The only count in the declaration which is now material, is for several fines for admission to several copyholds; the declaration states a custom for every customary tenant to pay a reasonable fine upon his admission, to be assessed by the lord, &c. that this tenement was of a large annual value, viz. of the annual value of £. 23. 8 *s.* 9 *d.* that the lord had assessed £. 46. 17 *s.* 6 *d.* as a fine for the defendant's admission to this tenement, and that this sum was a reasonable fine. On the evidence it appeared, that the fine should have been only £. 46. 4 *s.* 3 *d.* that being the full amount of two years value, and the question now is, Whether the plaintiff

Upon a writ of error from the judgment (a) of the Court of *King's Bench*, the following questions were put to the Judges by order of the House of Lords.

Parker v. Wells in error, E. 27 G. 3. B. R. Durn. & East, 783 15th May 1787. Dom. Proc.

(a) Durnford & East, 40.

First,

tiff can, in this case, recover a smaller sum than the fine assessed? Two things are necessary parts of this custom: 1. The fine must be *assessed*; 2. It must be *reasonable*. The lord says in his declaration, that he has *assessed* £. 46. 17 *s*. 6 *d*. for a fine, and that this sum was *reasonable*, and brings his action for that precise sum. The question for the Jury was, Whether £. 46. 17 *s*. 6 *d*. was a reasonable fine? and they found it was not, therefore the plaintiff is not intitled to recover. He has not assessed two years value, but a precise gross sum; and by what rule he went in assessing that sum, does not appear upon the record. It is true, he has averred that the estate is of a large yearly value, *viz*. of the yearly value of £. 23. 8 *s*. 9 *d*. but that is no averment of what the yearly value really is. And the averment in this case is totally immaterial. It would have been enough if the plaintiff had stated, that he had assessed the sum of £. 46. 17 *s*. 6 *d*. as a fine, and that such sum was reasonable; and it would *then* have been matter of evidence, just as it was on *this record*; whether the sum assessed exceeded two years value or not, because that is the established criterion whether it be reasonable or not. In the present case the duty is numerically certain, for it is not assessed with relation and in proportion to the annual value, but is fixed at a gross sum. The only case on this subject is *Titus* v. *Perkins* (a), which is reported in *Skinner* (b), *Carthiew* (c), *Levinz* (d), and 3 *Mod*. (e). The *Chief Justice* there says, "If the lord demand more than "he ought, he may make his demand *de novo*, for the "Judge, in case of a *greater* demand than is due, ought "not to adjudge as much as is due to the lord, and bar "him for the residue, but ought to adjudge against him "for the whole, and that his entry was tortious, *if he* "*had entered*, and put him to a new demand (f)." This goes to the demand itself, and is not confined to the case of a forfeiture; and there is no such distinction made in that case (which had been insisted on at the bar.) The *gist* and foundation of every action must be proved as laid

(a) C. B. H. 1 et 2 Jac. 2.

(b) Skinn. 247.

(c) Carth. 12.

(d) 3 Lev. 249. 255.

(e) 3 Mod. 132. Reported also in Comberb. 43.

(f) Skinn. 249.

 in

A venire facias de novo awarded by the House of Lords, upon a writ of error upon a special verdict, the finding being insufficient.

First, Whether the finding on this verdict be sufficient whereupon to give final judgment?

Secondly, If the finding be insufficient, what award ought to be made on such finding?

Thirdly, If the finding be sufficient, whether upon such finding the plaintiff in error appear to be a trader, within the true intent and meaning of the statutes concerning bankrupts?

The Lord Chief Baron *Eyre* delivered the unanimous opinion of the Judges present upon the *first* question in the negative; and upon the second question, that a write of *venire facias*

(g) Walker v. Witter, Doug. M. 19 G. 3. p. 1.

(h) Vide Doe & Jackson, Doug. E. 19 G. 3. p. 167.

(i) 2&3 Ed 6. c. 13.

(k) Gardiner v. Croasdale, B. R. H. 33 G. 2. 2 Burr. 904. 1 Blackst. 198.

in the declaration. This action is for a certain precise sum, and, under the circumstances of the case, it could not be brought in any other way. The cases cited for the plaintiff, *viz.* of debt on a foreign judgment (g); or against a tenant for *double the value of the land*, when he holds over under the statute of 4 *Geo.* 2. *cap.* 28 (h); or for *treble the value* for not setting out tithes, under the statute of *Ed.* 6. (i); or of *assumpsit* for a total loss on a policy of insurance, when there has been only a partial loss (k), are not at all applicable to the present case; for, in all of those the *gist* of the action is supported, and a case proved consistent with the declaration, those actions being not for a precise sum, but for a sum in proportion to what the Jury shall find to be the value or the damage. We give no opinion whether the lord might not have assessed a fine for two years value, and made that solely the foundation of his declaration. In *Titus* v. *Perkins*, a custom to have a year's value, generally, for a fine, was held to be good. But, however that might be, it is very clear that the evidence here did not support the declaration, for the plaintiff has no right to any thing but the sum assessed; the duty arises upon the assessment, and *that* by the evidence is proved to have been illegal and void. Therefore the case stands as if no assessment had ever been made, and consequently the plaintiff's right

cias de novo ought to be awarded; whereupon it was adjudged accordingly that the Court of King's Bench do award a *venire facias de novo*.

right to demand a fine is not yet complete. Therefore we are all of opinion with the defendant.

There was accordingly judgment for the defendant, becaufe, as the fine for the firſt tenement was to be deducted from the damages, he had paid more into Court than the plaintiff was intitled to recover.

IX. Of other Matters reſpecting new Trials, &c.

(20.) *Of New Trials in Inferior Courts.*

Cole v. Greene, H. 22 & 23 Car. 2. B.R. 1 Lev. 309. Converting a brewhouſe into tenements of greater value is waſt.

WAST in the *Huſtings, London,* upon a leaſe for years of a brewhouſe in *London:* the defendant pleaded *null waſt,* and iſſue upon this; and upon the evidence it appeared, that the defendant *took down the brewhouſe* and erected ſeveral houſes in the place, and improved the rent from £. 120 to £. 200 *per annum,* and by the direction of *Howell,* Deputy Recorder, before whom the cauſe was tried; (inaſmuch as by this, the nature of the thing and the evidence was altered;) the Jury found this to be waſt, and gave ſingle damages £. 200, which was trebled at £. 600; but then judgment was arreſted upon motion before Sir *William Wild,* the Recorder himſelf, for the inſufficiency of the verdict; becauſe the writ and count are *que fecit vaſtum venditionem & deſtructionem:* and the Jury found *fecit vaſtum venditionem & deſtructionem ſcil. divellendo* the brewhouſe, and taking the coppers, and the other particulars, *&c.* but they did not find any ſale of any of the particulars upon the place. *Long quinto E.* 4. 100. *in waſt* for felling and ſelling of trees, the defendant pleaded that he felled and employed them in

repairs,

repairs, and the plea was ill, becaufe he did not traverfe the *felling* notwithftanding that to this it was anfwered, that although in a plea the *felling* is material, becaufe if he fell them it is waft, although he repurchafes them and employs them in repairs, and becaufe the *felling* is traverfable, fo that it may appear to the Court, if the employing them in repairs be *waft* or not: but in a verdict when the waft is found this is fufficient whether they are fold or not. But the verdict was for this exception ruled to be infufficient, and a rule for a new trial granted, upon which the Jury, in refpect to the improvement, by the directions of Sir *William Wild*, before whom the new trial was had, gave a verdict for the defendant, and judgment was thereupon given for the defendant.

Upon this judgment *Cole* brought a writ of error before *Vaughan*, C. J. of C. B. *Hale*, C. B. *Turner*, B. and *Rainsford* and *Morton* Juftices, affigned at *St. Martin's-le-Grand*, and upon hearing of counfel before *Howell*, Deputy Recorder, the judgment, and both verdicts, and the rule for the new trial (which was) *quia videtur Cur' quod verdict. prædict. eft vitiofum & erroneum, ideo caffetur, & habeatur nova triatio*, were all certified, and before the faid Juftices fo affigned, four points were argued and adjudged. *Firft*, That the firft verdict was fufficient, for the reafon before alledged, *Raft. Entr.* 695. *b.* 696. *d.* 689. *Pafch.* 7. *Eliz.* 3. *Pl.* 1. *Secondly*, That both the verdicts and the rule were well certified at firft upon the writ of error, becaufe the Huftings being an inferior court, no diminution may be alledged of certifying more than is certified at firft, and if the firft verdict be not certified and the rule, the

Verdict fet afide, and new trial and contrary verdict, and judgment, and upon this error brought, and all certified without diminution.

the erroneousness of the proceedings in the Hustings cannot appear, and so no remedy upon the writ of error; and for this were cited *Co.* 8. 65. *Loveday's case, Co Entr.* 252. *Donnal's case.* *Thirdly*, That the Court here ought to reverse the judgment, because the court below erred in setting aside the first verdict as insufficient when it was sufficient. *Fourthly*, That the Court here ought to give the same judgment here for the plaintiff, upon the first verdict, as the court below ought to have given. And this by virtue of the words in the writ of error, *Et ulterius facturi quod ad justitiam pertinet secundum leges regni & consuetudinem civitatis prædict'*, and although no precedent was produced of such a thing done before in this case, yet they said they would presume the customs of *London* to be according to the common law, if no precedent was shewn to the contrary. And upon this all the Judges agreed and reversed the judgment, and gave judgment for the plaintiff upon the first verdict.

The Judges at St. Martin's give the same judgment as the Judges in the Hustings ought to have given.

Upon which judgment of reversal the defendant brought a writ of error in the House of Lords, and assigned for error that the Jury did not come *from the four next wards*, which according to the custom of *London* they ought to have done; upon which the defendant in error pleaded *in nullo est erratum*; and upon argument there, the Lords, with the advice of the Judges, resolved these points. First, that this was not assignable for error, being contrary to the record; because the award of the *venire facias est de quatuor proximis wardis*, and the writ returned served accordingly, and it is not like to the case 3 *Cro.* 320. nor 1 *Roll. Ab.* 761. which are of more infe-

Error contrary to the record is not assignable.

rior

rior courts, where it was assigned that one named *Alderman* was not an alderman. And one named *Steward of St. Catherine's*, was not *steward*. But the courts and customs of the city of *London* are confirmed by act of parliament, and are as the *grand sessions* of *Wales*, or the *palace-court*, and *Roll's* 1. *Abr.* 758. *nu.* 3. It may not be assigned that the deputy of the *grand sessions* before whom the cause was tried, was not deputy, and *Molins* and *Nesby's* case, *Trin.* 14 *Car.* 2. *B. R. Rot.* 1098. and *King* and *Allen's* case in the same court, it may not be assigned that the Judge of the *Marshalsea* was not judge, or was not present in court. *Secondly, that in nullo est errat'* is a demurrer, and although that this is error *in fact*, it is not confessed by the demurrer, not being assignable. But the demurrer is upon this in point of law, because not assignable, wherefore the judgment was affirmed and remanded to *St. Martin's* to be executed. And there it was objected that they could not execute it, because they had not any seal for sealing the execution. But to this a precedent was produced dated 11 *June*, 22 *Eliz.* between *Crowther* and *Gee*, where in a similar case, the justices seal the writ of execution with their particular hands and seals, and so the court resolved to have it done here, but before that this was done *Greene* the plaintiff in error died, not having any goods in *London*. And *Forth*, alderman of *London*, claiming by lease under *Greene*, had preferred a bill in Chancery, to be relieved by his bill. This wast being an improvement, but he for having an injunction, was ordered by the court to enter into a recognizance to answer for *Greene*, being an ancient man, and upon hearing the cause there in

In nullo, &c. is a demurrer, but does not confess error in fact not well assigned.

How the Justices in error at St. Martin's grant execution.

Chancery after verdict and judgment, and this affirmed in error, directs a new trial in wast.

in respect that there had been one verdict for the plaintiff and another for the defendant, *Bridgman*, Lord Keeper, after all these proceedings, directed a new trial at the bar of the *King's-Bench* to try in a feigned action, *wast or not*, and upon this trial before *Hale*, then Chief Justice, it was resolved to be wast notwithstanding the improvement, by reason of the alteration of the nature of the thing, and of the evidence, and the Jury gave their verdict accordingly, and 100 marks single damages, which trebled amounted to £.200. which the Chancellor compelled *Cole* to take.

The record certified immediately from St. Martin's into B.R. without mittimus out of Chancery.

Cole, for having execution of the place wasted, had the record transmitted by *certiorari* immediately from the justices at *St. Martin's* into B. R. without having this certified in Chancery, and from thence by *mittimus* sent into *B. R.* and from thence a *scire-facias* issued against the administrator of *Greene*, and against *Forth* and others, surmising that they were interested in the place wasted, and now held it; they came in and demurred to the writ, because the plaintiff ought not to have seisin, because *non constat* that *Forth* entered upon title under *Greene*. 2. Because the record is not legally removed into this Court to be executed, wherefore judgment was prayed of the writ, and that the same might be quashed.

Scire-facias against tenants in possession quia ingressi sunt, without shewing title.

And now four questions were resolved by the whole Court; *First*, That the record was legally removed immediately into this Court by the *certiorari*, without *mittimus* from the Chancery, upon these precedents, *Reg*. 209. *F. N. B.* 242, 246. *B.* 190. *F. Reg.* 160, 285. and *F. N. B.* 243. *Secondly*, That it being in this Court, this Court shall execute it notwithstanding *Hutt.* 117. *Risham* v. *Goodwin*, that

† this

this Court shall not execute the judgments of inferior courts, and this resolution was grounded upon *Pasch.* 22 *H.* 7. *Rot.* 369. *Rastall's Entr.*. 531. *Ashton's Placita Rediviva*, 145. *Mich.* 3. *Jac.* 1. *B. R. Rot.* 2311. *Hil.* 3. *Jac.* 1. *Co. B. Rot.* 1819. *Pasch.* 4 *Jac.* 1. *B. R. Rot.* 337. *Bre. Judicialia*, 130. *Hil.* 9. *H.* 4. *Rot.* 130. *Thesaurus Brevium.* 40, 41, 42. *Rast. Entr.* 169, 192. *Co. Entr.* 180, 342. *Reg.* 170. *F. N. B.* 242, 243. *Thirdly*, That the *scire-facias* was good, without shewing by what title *Forth* entered. And this upon *Rast. Entr.* 236. *Moyle*, 160. 2 *Bro.* 110. *Bre. Judicialia*, 155. 253. *Rast. Entr.* 279. 452. *Reg. Judic.* 20. 50. and generally in recoveries in real actions, the *scire-facias* is against *tales* and *tales qui ingressi sunt.* *Fourthly*, It was resolved by all the Justices, that the plaintiff shall have judgment to have execution, and not *respondeas ouster*, because although the conclusion of the demurrer is in abatement, yet the beginning being in bar, the judgment shall be peremptory, *Mich.* 15 *Car.* 2. *B. R. Rot.* 703. and so it was, and the plaintiff had execution.

B. R. executes judgments given in inferior courts.

Plea beginning in bar, although it concludes in abatement, judgment peremptory.

Norton and *Levinz* for the plaintiff *Cole*, throughout this cause. *Finch*, *Jones*, and others for the defendant.

It was held by the Court that a new trial cannot be granted in an inferior court; for they are not like trials by *nisi prius*, which are subordinate upon writs issuing out of this Court, over which the Court have authority and inspection; but this was a new trial a year after the first, which the Court blamed.

The case of the Mayor and Aldermen of Bristol, Mich. 1 Ann. B. R. 2 Salk. 650. S. C. Fares. 84. 85. 1 Salk. 201. pl. 4.
No new trial in inferior courts. Sed vide post.

YORKE

Brooke v. Ewers & ux. M. 5 G. in B. R. 1 Stra. 113. Mandamus in nature of a procedendo ad judicium.

YORKE moved for a *mandamus* to the Judge of the Court of *Sandwich*, to give judgment upon a verdict, though he had granted a new trial for excessive damages, without payment of costs.

And for the *mandamus* he quoted 1 *Ven.* 187. *Raym.* 214. 2 *Keb.* 871. And he likewise insisted, that a judge of an inferior court cannot grant a new trial, as was held by *Holt, C. J. Mich.* 1 *Ann. Hall v. Hill.* 1 *Mod. Ca.* 84. *Salk.* 201. 650. And likewise by *Parker*, C. J. *Pas.* 12 *Ann. Page* v. *Round.*

A judge of an inferior court cannot grant a new trial. Sed vide post.

And to that opinion the Court inclined, and granted a *mandamus* unless cause, and upon that the Judge below, as well advised, *quierit.*

Rex v. Peters et al', or Cavil v. Burnaford et al', E. 31 G. 2. B.R. 1 Burr. 568. An inferior court may set aside a regular interlocutory judgment, for the purpose of trying the merits.

Mr. *Hussey* shewed cause against the issuing of a *mandamus.*

A motion had been made by Mr. *Whitaker* (on 13th *February* 1758) for a *mandamus* to be directed to the defendant *John Peters*, the county clerk (who was the steward of the court) and also to the free suitors of the *county-court* of the county of *Cornwall*, commanding them to *proceed to final judgment* in a certain cause by plaint in replevin, commenced in the said county-court, between *John Cavil* plaintiff, and *John Burnaford*, *Anthony Pomery*, and *Nicholas Pelyne*, defendants; in which cause the said *John Cavil* obtained an *interlocutory judgment* in the said county-court.

The *case*, in short was—That *Burnaford* distrained *Cavil* for rent; *Cavil* brought a replevin, in the county-court of *Cornwall*; an INTERLOCUTORY JUDGMENT *was regularly entered*; and a writ of inquiry of damages executed thereupon; and 2*d.* assessed for damages,

mages, and 5*s*. for cofts, and fo much more cofts as the Court fhould allow.

This *inquifition* was fet afide for *irregularity* (*viz. want of notice* of executing the writ of inquiry.)

The defendant's advocate there then moved "To *fet afide* the faid (regular) INTERLOCU-"TORY JUDGMENT *itfelf*; UPON the *defend-"ant's paying the cofts of entering it,*" (to be taxed by the STEWARD) *and on avowing if-fuably*: and afterwards, on a fubfequent motion "to make fuch rule abfolute," it being urged by the other fide, "that that court had "no power to fet afide a *regular* judgment," the Judge took time to advife. At a future court, after inquiry from ancient practifers in the faid court, and being informed that it had been *the conftant cuftom and ufage of it* "To "SET ASIDE *interlocutory judgments any time "before executing writs of inquiry therein*, ON "the defendant's paying the cofts of entering "the fame judgments, and pleading iffuably "to fuch actions *inftanter*;" and after having fully confidered the affair in all its circumftances; and apprehending it to be agreeable to the practice of *this* Court; he declared his opinion "that *it ought to be fet afide*, and the "defendant's avowry received, they having "paid the cofts, at the time of filing it *de "benè effe*," (which had been done in the interim): and accordingly he made a rule, thus —"*Cavil* v. *Burnaford et al'*. It is *ordered*, "*&c.* That the interlocutory judgment en-"tered in this caufe *be* SET ASIDE, on pay-"ment of cofts taxed; and that the avowry "filed in this caufe *de benè effe*, laft court-"day, be now, on confideration of the Court,

 "made

"made absolute: and therefore rule for the
"plaintiff in replevin to plead in bar to the
"avowry."

And the Judge of this inferior court swears "That he acted with the utmost impartiality "in the affair, and according to the best of "his judgment and understanding; and, he "apprehends and believes, according to the "CONSTANT USAGE AND PRACTICE *estab-* "*lished and observed in the said court.*"

Mr. *Whitaker*'s motion was grounded upon the *inferior judge*'s having *exceeded his authority*. And he had cited 2 *Strange*, 823. *Fox* v. *Glass*. H. 1728. 2 *G*. 2. as the *first* time that even *this Court* had set aside REGULAR judgments; and 1 *Strange*, 392. *Bayly* v. *Boorne*, *M*. 7. *G*. 2. where they doubted of an *inferior* judge's having such power.

On *Friday* last (21st *April*, 1758) Mr. *Hussey* shewed cause why this *mandamus* should not issue. And he made the two following questions.

1st. Whether the judge or steward of an *inferior court* has a right to SET ASIDE *interlocutory judgments* REGULARLY obtained?

2d. Whether in *this particular case*, the steward of *this* inferior court had a right to do as he had done, and as is the practice of *that* inferior court?

As to the first question, He agreed they *cannot* grant *new trials*, 1 *Salk*. 201. *Regina* v. *Hill*, *et al'*, and 2 *Salk*. 650. the case of *Bristol* (which is S. C.) *Brooke* v. *Ewers*, *et al'*, 1 *Strange*, 113. *S. P.* A *mandamus* issued to a judge of an inferior court, "to give judg-"ment:" *though* he had granted a new trial. Therefore he would not contend that an inferior

V. ante.

V. ante.

ferior court has a right to ſet aſide *a regular* judgment, UNLESS it be to let in the *merits.* But they *may* do it *in order to* TRY THE MERITS, 2 *Salk.* 650. In the caſe of the mayor and aldermen of *Briſtol,* it was holden "that "*an inferior* court could not grant *a new* "*trial.*" However, it was long ſince done by *this* court: and they would alſo *formerly* ſet aſide *regular judgments,* on putting the plaintiff in as good condition as before. And it does not appear how the Court came to leave it off; as Sir *John Strange* ſays (in the caſe of *Fox* v. *Glaſs*) that they had done. V. ante.

And it ſeems right in itſelf, and agreeable to natural juſtice, to permit inferior courts to ſet aſide regular *interlocutory* judgments, in order *to let in a trial of the* MERITS. Indeed it is reaſonable, *not* to permit them to ſet aſide the *verdicts of* JURIES: which is an exceedingly different caſe from a judgment by default.

As to the 2d queſtion.—In the *preſent* caſe, the ſteward acted rightly and reaſonably, upon the circumſtances attending it. Mr. *Whitaker, contra,* for the *mandamus.*

The *letting in the trial of the* MERITS, makes *no difference.* I ſay that an inferior court can *not* ſet aſide a *regular* judgment after they have *once exerciſed their authority.* In 1 *Strange,* 392. *Baily* v. *Boorne, M.* 7. *G.* 2. *B. R.* the Court thought it a queſtion that deſerved conſideration, "Whether the judge "of an inferior court *could* do it." And there is no more reaſon why they ſhould have *this* power, than that of ſetting aſide *verdicts.* They have no ſuch *diſcretion.* "*Diſcretion*" is another word for "arbitrary will."

Lord MANSFIELD denied this interpretation

 of

of the term *discretion*; and referred to what was said (a few days ago) in the case of *Rex* v. *Young*, and *Pitts* (vide 1 *Burr.* p. 560. and 561, 562.) And he said that DISCRETIO is, as Lord *Coke* says, "discernere *per legem* quid "sit justum."

To which observation, Mr. *Just. Wilmot* desired to add another, from 5 *Co.* 100. *a. Rooke*'s case: "DISCRETION is a science and understanding of distinguishing and discerning between falshood and truth," &c. &c. and NOT to do "according to *arbitrary will* and *private* "*affection.*"

Mr. *Whitaker.*—But these inferior judges have *no sort* of discretionary power of *any kind.*

Lord MANSFIELD.—That case of *Baily* v. *Boorne*, in 1 *Strange*, 392. only says "That it "was a question that deserved considera-"tion."

But there is *no precedent* or *authority* to the contrary of their having such a power. And it seems a power *necessary to the exercise of judicature*; and is very different from the case of setting aside VERDICTS.—*This* power to set aside *interlocutory* judgments, seems *incident to justice.*

However, both Lord *Mansfield* and the other * two judges, thought it might not be amiss to look into it. And—

* Mr. Justice Foster was absent.

Mr. Just. *Denison* intimated as if there was something of this sort before the Court, in † P. 28 *G.* 2. B. R.

† It was in Hil. 1754. 27. and P. 1755. 28 G. 2. Eastwell v. Livermore.

CUR' *advisare vult.*

And now Lord MANSFIELD delivered the opinion of the Court; having first desired Mr. *Hussey* to state the case, for the sake of the stu-

 dents:

dents: (for he took this opportunity of observing and declaring "That nothing *misleads* "so much as reporting the determination of "courts of justice, without having a sufficient "and *correct state of the case*:" which, he said, was only an *ignis fatuus*, leading people into an *error* and *mistake*).

Here, the *question*, upon the *true* state of the case (which *v. ante*) appears to be "Whe-"ther an INFERIOR *court* has POWER *to* SET ASIDE *a* REGULAR INTERLOCUTORY *judgment*, in ORDER *to let in the trial of the* MERITS."

And we are all of us of opinion, "That they "HAVE such a power." There is no *authority* nor even *dictum*, to the *contrary*; nor is there any *reason* why they should not have such a power; which is *incident* to the doing of *justice*.

Indeed there *are* authorities which say, "That an inferior court can *not grant a* NEW "TRIAL, or *set aside the* VERDICT *of a* JURY, "but for irregularity."

But there may be many reasons why they may be permitted to set aside an *interlocutory* judgment, *in order* to let in the *merits*; which reasons will not hold so far as to make it allowable for them to set aside the *verdict of a jury*: (one of which reasons may be, "that *no* "*attaint* lies upon a verdict given in an *infe-*"*rior* court,") and indeed the setting aside a *verdict of a* JURY, is too great power to be intrusted to an *inferior* jurisdiction. Yet

We are, all of us, clearly of opinion "That "they *may* set aside *regular* INTERLOCUTORY "judgments, *in order* to let in the *merits*;" both upon the *reason* of the thing, and for the *convenience* attending it.

 That

That caſe in 1 *Strange*, 392. of *Baily* v. *Boorne*, proves nothing at all againſt this. And in 1 *Strange*, 499. *Jewell* v. *Hill*, *H.* 8 *G.* 1. an inferior judge ſet aſide *even a verdict*, for *irregularity* (or rather for ſurprize) which this Court allowed he might do.

Mr. Juſt. *Deniſon* added, that in the caſe of *Eaſtwell* v. *Livermore*, it ſeemed to be underſtood and agreed at the bar, " That an in-" ferior court could not ſet aſide a verdict, " * AT ALL :" but he finds that he has written a note at the bottom of that caſe, importing that *he himſelf* thought that it ought not to be taken for granted, *ſo generally* as this is laid down, " That they cannot do it * *at all* ;" for that he thought " that an inferior court *may* " ſet aſide *even* a *verdict for* IRREGULARITY ; " though they are not to be truſted with a " power of ſetting aſide *verdicts upon the* ME-" RITS."

* It is true that there was no diſtinction expreſſed in the diſcuſſion of that caſe. But no irregularity was there pretended; nor any other reaſon attempted to be given for ſetting aſide that verdict, but becauſe it was a hard one, and ſuch as ought to be ſet aſide.

And *this*, he ſaid, was certainly the RIGHT *diſtinction* ; *viz.* That they *may* ſet aſide even verdicts, *for irregularity* ; but *not* upon the merits.

Wherefore *per Cur.* unanimouſly,

Let the RULE made " That *John Peters* " the county-clerk, and the free ſuitors of " the county-court, ſhould ſhew cauſe why " a *mandamus* ſhould not iſſue, directed to " them, commanding them to proceed to " final judgment in a certain cauſe by plaint " in replevin commenced in the ſaid county-" court, between *John Cavil*, plaintiff, and " *John Burnaford*, *Anthony Pomery*, and *Ni-" cholas Pelyne*, defendants, in which ſaid cauſe " the ſaid *John Cavil* obtained an interlocu-" tory judgment in the ſaid county-court, on

" the

"the 12th day of *October* laſt;"—*be* DISCHARGED.

RULE DISCHARGED.

N. B. In the caſe of *Blackquiere* and others, aſſignees of *Sampſon* and another, *v. Hawkins*, aſſignee of *Wooldridge* a bankrupt, *Doug*. 365. *per* Lord *Mansfield*, Inferior courts cannot grant a new trial. This muſt be underſtood in a limited ſenſe. *Vide* the caſe preceding.

IX. Of other Matters respecting new Trials, &c.

(21.) *Of withdrawing Pleas, Replications, Demurrers, &c.*

Nichols v. Sutcliff, T. 7 G. 2. B. R. Ann. 56. Motion to withdraw plea of nihil debet, and plead non assumpsit; granted in the common terms.

IN an action on the case on *assumpsit*, it was moved on behalf of the defendant for leave to withdraw the plea of *nihil debet*, which he had put in, and to plead *non assumpsit*. The following cases were cited to shew that the Court had granted this liberty before: *Edes* and *Mason*, *Pasch.* 5 *Geo.* 2. *B. R.* moved to withdraw the general plea *non assumpsit*, and to plead a *tender* as to part, and *non assumpsit* to the rest, and granted. In the case of *Mostyn* and *Totty*, 3 *Geo.* 2. in *Scacc.* the Court gave leave to withdraw demurrers, and plead the general issue.

Granted on the common terms of payment of costs, and taking short notice of trial.

Jeffereys v. Walter, M. 21 Geo. 2. B. R. 1 Wilf. 177. Leave given to withdraw non est factum to a bond, and to plead the statute of gaming. V. post. Taylor v. Joddrell.

Rule for the plaintiff to shew cause why the defendant should not have leave to withdraw his plea of *non est factum* to a bond, and to plead the *statute of gaming*, upon payment of costs, taking short notice of trial, and giving judgment of this term in case there be a verdict for the plaintiff, grounded upon an affidavit

davit that instructions had been given by the defendant to his attorney to insist upon the *statute of gaming*; and the attorney apprehending that he could give *that statute* in evidence on *non est factum*, did not plead the *statute* specially. It was objected for the plaintiff that this had never been done, that the defendant had been guilty of an affected delay by exhibiting a bill in Chancery against the plaintiff for a discovery, relief, and injunction, to which he had put in his answer, that the defendant first pleaded *nil debet*, which he would not stand by, and then pleaded *non est factum*, and an injunction with liberty to proceed to judgment was granted in Chancery.

PER CURIAM, (*absente Cap. Justic.*) The Court will not give leave to withdraw the general issue, and plead specially where it is to the prejudice of the plaintiff, or where there has been an affected delay; in this case it appears by the answer in Chancery that the defendant has a good defence at law, and here is no affected delay. In the case of *Malters* and *Shelmandine*, *Mic.* 15 *Geo.* 2. leave was given to withdraw the general issue Not Guilty, and plead a justification, upon the like terms as in the present case; and they said they remembered several other cases where the like had been done by the Court; so the rule was made absolute.

Waters v. Bovell, T. 21 & 22 Geo. 2. B. R. 1 Wils. 223.
Leave given to add a plea after two terms since the first pleas were pleaded, and after issue joined.

TRESPASS: the defendant justified for toll at *Hounslow*, and pleaded two pleas in *Hilary* term last; and in this term, after issue joined, obtained a rule to shew cause why he should not have leave to amend his two pleas, and to add a third plea. Upon shewing cause, Mr. *Ford* objected to adding the third plea, because

because it was now *two* terms since the defendant pleaded; and compared it to the course of the Court not to give a plaintiff leave to add a count after *two* terms.

But *per Curiam* (absente *Wright, J.*) the rule must be absolute upon paying costs, both as to amending the two pleas, and adding a third; for there is no time limited for application to the Court to plead several pleas; the reason why a plaintiff must apply for leave to add a count within *two* terms, is because he is obliged to declare within *two* terms, otherwise he will be out of Court, and a new count is considered as a declaration; and the plaintiff's being refused after *two* terms to add a count, is not under such difficulty as the defendant would be if he were refused to add a plea after *two* terms, because the plaintiff may have a new action.—Serjeant *Draper* for the defendant.

Taylor v. Joddrell, M. 23 G. 2. B. R. 1 Wils. 254.
The defendant permitted to plead a special justification after he had pleaded the general issue, upon terms.

IMPRISONMENT: defendant pleaded the general issue inadvertently, and now moved to withdraw it, and for leave to plead a justification that he was master of a ship, that the plaintiff was making a mutiny therein, and so he imprisoned him; this was done in *Blackburn* v. *Matthews*, upon terms of taking short notice of trial. And in *Tarlton* v. *Wragg*, *Trin.* 20 *Geo.* 2. defendant pleaded the general issue, and wanting afterwards to pay money into court, the defendant had leave to withrdaw his plea, pay money into court, and plead the general issue again. In *Trin.* 21 *Geo.* 2. *Water* v. *Bowell*, the defendant in *Hilary* term before having pleaded two pleas, had leave in *Trin.* term following to plead a third plea; and in *Mic.* 21 *Geo.* 2. *Jeffereys* v. *Walter*, leave was given

Vide ante.
Vide ante.

given to withdraw *non est factum*, and to plead the statute of gaming.

Per Curiam: There are many instances of this having been done when the Court can prevent the plaintiff from suffering any inconvenience by it, as by obliging the defendant to take short notice of trial, and that, if there be a verdict for the plaintiff, he shall have judgment as of the present term; therefore let the defendant be at liberty to plead a justification, and the general issue also, if he pleases, upon the terms mentioned.

Robinson v. Raley, T. 25 Geo. 2. Rot'lo. 775. E. 30 Geo. 2. B. R. 1 Burr. 321.

Motion for leave to withdraw two demurrers, and plead to issue, upon payment of costs, refused, because several issues in fact had been tried.

Mr. *Norton* moved for leave to *withdraw* two *demurrers*, and plead to issue (upon payment of costs); and a RULE was thereupon granted, to SHEW CAUSE.

And now Mr. *Yates* shewed cause, for the plaintiff, against the defendant's being at liberty to withdraw the two demurrers, and plead to issue. And he cited 6 *Mod.* 102. *The case of Cross v. Bilson* (a), 6 *Mod.* 1. The case of *Staple v. Haydon* (b), 1 *Ld. Raym.* 668. The case of *Fox* v. *Wilbraham*, and 2 *Strange* 1002. (c) *The Bank of England* v. *Morrice.*

(a) V. post Essay V.

(b) V. post Essay V.

(c) V. post Essay III.

Serjeant *Poole*, and Mr. *Norton contra*, for the defendant.—

The merits have not been tried upon these demurrers. We move this at *common law*, not under any statute. And the Court are not bound down by any certain rules. And they cited 2 *Saund.* 402. *Rex* v. *Ellames* [2 *Strange*, 976]. *Dutchess of Marlborough* v. *Widmore*, *Hil.* 4 *G.* 2. *B. R.* The case of *Cope* v. *Marshall*, *Tr.* 28 *G.* 2. *B. R.* [V. 1 *Burr.* 259, *S. C.*]

The case of *Giddins v. Giddins*, [Tr. 29,

30 G.

30 G. 2. B. R.] was even after the Court had given their opinion*.

* It was after a demurrer and argument only; but the Court had given no opinion; and the rule was made absolute without defence.

And here is a declaration of twenty counts, manifestly intended to catch the defendant, and to save costs.

If our motion is granted, the *contingent* damages assessed, will be out of the case, and will be as none at all.

Lord MANSFIELD,—It is admitted to have been done *after a* DEMURRER *and argument*: but this is *after a* TRIAL, and *without any* favourable circumstances.

Now as no case of such an amendment *after a* TRIAL is cited, I take it for granted that *none* EXISTS.

These are frivolous demurrers; and the only view of this motion is *to get rid of the costs*. But the plaintiff would have had his costs, if the defendant had done right at first, and joined issue upon these facts, *if* they had been found *against* him.

So that here is neither precedent, nor reason for allowing this motion.

Mr. *Justice* DENISON concurred.

Where the demurrer is first argued, *before* any trial of the issues, the court will give leave to *amend*: as in the case of *Giddins* v. *Giddins*. But this is an attempt to amend an issue at *law*, AFTER *a verdict* has been found on the issues *upon* FACTS, and *contingent damages found* upon the demurrers: of which there *never was an instance*. And we do not know where it would end; nor do I well know how the cause *could* be again carried down to trial. If this had at first gone down to issue, and had been found *against* the defendant, it would have carried costs.

The Court cannot help seeing that this is

upon

upon RECORD: here are *verdicts* and *contingent damages* found, therefore we cannot help this: I wish we could; because the merits seem to be with the defendant.

The cases of amendment cited are where the whole is supposed to be *in* PAPER; or else the Court COULD NOT *have done it.* We have no authority to do this, AFTER 'tis plainly *upon* RECORD. Mr. *Justice* FORSTER concurred.

Per Cur' unanimously JUDGMENT for the PLAINTIFF upon the DEMURRERS.

After issue joined upon a plea in bar to an avowry, the Court would not suffer the plea to be withdrawn, and the avowry confessed, without consent, as the avowant would lose his costs. *Skin.* 594.

In the case of *Collins* v. *Blantern*, 2 *Wils.* 341. *C. P.* refused to let plaintiff withdraw a demurrer to the defendant's plea, and take issue; but this was after two arguments. Vide ante, L. E. Intro. (k).

Mr. *Hussey* shewed cause against a rule of Mr. *Gould*'s, "why the plaintiff should not "be at liberty to *withdraw his replication*, and "*reply de novo.*" Alder v. Chipp, H. 32 Geo. 2. B. R. 2 Burr. 755. Withdrawing a replication and replying de novo, considered as an amendment.

The case was, that the plaintiff had (by the mistake of his former attorney) traversed a lease under which he himself claimed.

The Court made the rule absolute.

And Lord MANSFIELD said, he considered this as an *amendment*, and that the proposing it in this method of withdrawing the replication and replying *de novo*, was only to prevent the defacing and obliterating the roll. And he observed, that the Court had not used the same *strictness* of late years, with regard to *amendments*, as they formerly did: and he said, it was much better for the parties that they should

not.

not: however, the Court would always take care that if one party obtained leave to amend, the *other* party should not be *prejudiced nor delayed* thereby.

* 2 Stra. 1102.

And he observed that the case of the * Bank of *England* v. *Morrice*, turned upon its own particular circumstances, and was the case of an *executrix* too.

Note,—The length of time in the present case had been objected; *viz.* six terms. But it was answered, " that in many cases, amend-" ments had been made after a much longer " time."

Rule made absolute.

Wilkes, Esq. v. Wood, Esq. member of parliament, M. 4 Geo. 3. C. B. 10th of November, 2 Wils. 204. Leave to withdraw the general issue, and plead a special plea upon terms, and waiving privilege of parliament. V. ante.

In trespass, assault, and imprisonment, the defendant pleaded the general issue, whereupon issue was joined last term, and notice of trial given for to-morrow the 11th of *November*. On *Monday* last the 7th of *November*, the defendant moved for leave to withdraw his plea of the general issue, and to plead again the general issue, and a special justification under a warrant of *Lord Hallifax*, secretary of state; and relied upon the case of *Taylor* v. *Jodrell*, *B. R. Mich.* 23 *Geo.* 2. where, in imprisonment, the defendant had pleaded the general issue, the Court gave him leave to withdraw that plea, and plead a justification that he was master of a ship, that plaintiff was making a mutiny therein, and so he imprisoned him, upon terms of taking short notice of trial, and giving plaintiff judgment of the same term. The like was done in *Blackburn* and *Matthews*, *Trin.* 23 *Geo.* 2. *B. R.* and in many other similar cases, where the Court could prevent the plaintiff from being delayed, or suffering any inconvenience.

2 Serjeant

Serjeant *Glynn* for the plaintiff, objected that the defendant could not, by coming into the usual terms, put the plaintiff into the same situation he was now in, the privilege of parliament taking place next *Monday*; whereupon defendant agreed to waive his privilege; but it was answered by *Glynn*, that the privilege of a member was the privilege of the whole house, and that he could not waive it without leave of the house; and that the house might insist upon the privilege.

CURIA. We will not suppose any thing so dishonourable in the House of Commons: let the rule be made absolute upon defendant's taking short notice of trial, and that if the plaintiff has a verdict, he shall have judgment of this term.

Wilkes against *Webb*, Esq. member, *&c.* the like motion, and the like rule. 2 Wilf. 205.

This was a special action upon the case against the defendant, for deflowering the plaintiff's daughter *per quod servitium amisit*: the defendant having pleaded the general issue, now moved for leave to withdraw that plea, and to plead the same plea again, together with the plea of the statute of limitations; upon an affidavit made by the defendant's attorney, that at the time when he was bound to plead by the rule of the Court, and then pleaded the general issue only, he was not fully instructed by his client what to plead; and a similar case was cited in B. K. of *Vile* v. *Barry*, wherein the Court permitted this, upon an affidavit made by the very same attorney, that he was pressed for a plea, and was obliged to plead before he was instructed, and therefore pleaded

Cox v. Rolt, T. 5 Geo. 3. C. B. 2 Wils. 253.

Practice. The Court refused to permit a defendant to add the plea of the statute of limitations.

pleaded the general iſſue to prevent judgment.

Upon ſhewing cauſe it was inſiſted for the plaintiff, that the general rule of both the courts of B. R. and C. B. is to permit a defendant to withdraw a ſpecial plea, and plead the general iſſue, but not *vicê verſâ*; and many caſes were cited to ſhew this to be the practice, which was agreed to be ſo by the Court; and it was ſaid, that in the caſe of *Vile* v. *Barry*, the attorney was ſurpriſed, not inſtructed, and pleaded the general iſſue to prevent judgment: and for that reaſon the Court of King's Bench deviated from the general practice in that particular caſe; but here the affidavit made by the ſame attorney does not go ſo far, and therefore the rule ought to be diſcharged.

Curia. It is a good maxim, that the law will rather ſuffer a particular miſchief than a general inconvenience; general rules of practice muſt be ſtrictly obſerved for the ſake of certainty, or practiſers will be negligent. Indeed under very ſpecial circumſtances, the Court will permit a defendant to add a ſpecial plea; in a late caſe of public concern, the defendant being adviſed by his counſel that he might give the ſecretary of ſtate's warrant in evidence upon the plea of the general iſſue, pleaded *that* plea only; the judge before whom that cauſe was tried, having been of a contrary opinion, it was afterwards moved in a ſimilar caſe of *Wilkes* v. *Webb*, to withdraw the general iſſue, and plead the ſame plea again, and a ſpecial juſtification under the ſecretary of ſtate's warrant, which was allowed by the whole court; the defendant at the time of pleading the general iſſue only, being ill

Vide ante.

adviſed

advifed by his counfel, and not knowing then the opinion of the judge who tried the former fimilar caufe; befides, *that* fpecial plea was allowed to try the real merits of the cafe, but the plea of the ftatute of limitations is not to be favoured, becaufe it excludes the merits; the Court gives leave to add a plea for the furtherance of juftice, but to permit this plea of the ftatute of limitations, would not be fo. The rule was difcharged *per totam Curiam.*

Serjeants *Hewitt* and *Davy* for the defendant, Serjeant *Burland* for the plaintiff.

Ellis qui tam, &c. v. —— H. 8 G. 3. C. B. 2 Wilf. 369. Where a defendant pleads a fham plea, the Court will not let him withdraw it and plead the general iffue.

Action upon the ftatute for felling coals fhort in meafure, to recover £.50. penalty. The defendant laft term pleaded a recovery in B. R. for the fame offence, and now he moved to withdraw *that* plea, to plead the general iffue, and take fhort notice of trial; but *per Curiam*, the defendant has delayed the plaintiff by this fham plea, he has produced no affidavit that he has any merits, and deferves to pay the £.50. for pleading a fham plea, fo the rule muft be difcharged.

ESSAY. III.

Of Special Verdicts, &c.

IN the case of *Hayward* v. *Fulcher*, *Trin.* 21 *Jac. Rot.* 662. *Palmer*, 491—505, in trespass, judgment was given for the defendant by reason of the uncertainty of the verdict. Uncertainty of the verdict.

Where a special verdict is good because it is true, the Court must adjudge the law upon the truth, and are not bound by the finding of the Jury.

In ejectment in B. R. in this cause, the special matter was found as follows, *viz.* that *William Humfryson*, who was seised in fee, suffered a common recovery to *Simmerton* and *Fulke*, M. 28 *H.* 8. to the intent that they should grant an estate to him and *Elinor* his wife, for their lives, the remainder *seniori puero* of the body of the husband in tail, the remainder over in fee to one *Kinersley*: the recoverors made a feoffment accordingly *Anno*, 2 *E.* 6. and afterwards *Humfryson* covenanted by indenture with the said *Kinersley*, to levy a fine with his wife, to the use of himself and his wife for their lives, the remainder *to the use of the eldest child of his own body in tail*, the remainder in fee to *Kinersley*; which fine *Anno*, 3 *E.* 6. was levied accordingly with general warranty; and the feme died, and *Humfryson* took

Lane v. Cowper, E. 17 Eliz. Mo. 103. n. 248. [illegible] covery suffered to certain [illegible] remainder to [illegible] [illegible] puer[illegible]

Covenant to levy a fine, with his wife, to uses, remainder to eldest child of his own body in tail, remainder in fee to K. Fine levied. Feme dies, [illegible] cnusor [illegible]

takes another wife: hath issue, first a daughter, afterwards a son, who, within age, leases to the plaintiff, without reserving rent: defendant, as servant to the daughter, entered upon the lessee.

took another wife, by whom he had issue, first a daughter, and afterwards a son, and died: the son, within age, made a lease to the plaintiff, as in the declaration is alledged, but no mention in the verdict of any rent reserved; the defendant, as servant to the daughter, entered upon the lessee; and so, &c. upon the whole matter, if it should seem to the Court that the entry of the daughter was lawful, the jury found the defendant not guilty; but if it should seem to the Court that the entry of the daughter upon the lessee of the son was not lawful, they found the defendant guilty, and assessed costs and damages: upon which verdict so returned, it was often argued at the bar, and by the bench, and at last by all the justices in bank openly: and it was divided into *ten* points.

Uses.

The 1st. To what uses the recoverers are seised as to the execution of the estate again to *Humfryson* and his wife: and as to this, all the Justices argued that they were seised to their own use, by the intent of the recovery, because otherwise they could not rightfully make an estate to him who suffered the recovery again, as they ought to do.

Remainder.

The 2d. If *seniori puero* be a good name of purchase by way of remainder, he not being in *rerum natura*, at the time of the limitation. And in this also they all agreed that it is a good name of purchase: and *Gawdy* and *Wraye* put the diversity, (*viz.*) that a person not in being at the first, may take a remainder by purchase, if he be *in esse* before the particular estate determined, so that the limitation of the remainder be in general words, as to the right heirs of *J. S.*, or to him who shall first come to *St. Paul's*, to the wife that shall be, and the like. But if the limitation be in special

cial words, as to *Jane*, the firſt wife of *J. S.* where he hath not any wife at the time, or to the mayor and commonalty of *Iſlington*, where there are not any ſuch at the time there, although before the determination of the particular eſtate, *J. S.* takes one *Jane* to wife, or *Iſlington* be incorporated by the name of the Mayor and Commonalty, yet they ſhall not take the remainder.

The 3d. If the remainder ſhall be in abeyance until the birth of a ſon, or whether the eſtate tail ſhall be executed in the father until the birth of a ſon: and in this alſo they all agreed that the remainder is in abeyance, until the tail executed, and vouched 30 *Aſſ. Stafford*'s caſe, where the remainder was limited *propinquioribus de ſanguine*, and 1 *Aſſ.* to the wife that ſhall be. Remainder in abeyance.

The 4th. If by the fine the remainder which followed the eſtate in abeyance was put to a right, or whether it ſhould be preſerved from tort, by the law: and as to this, *Gawdy* and *Wraye* agreed that the remainder in abeyance is preſerved, and the eſtate is not converted into a right by the fine of the particular tenant; and they compared this to deſcents and non-claims in the time of vacation of a biſhoprick, which ſhall not prejudice the ſucceſſor; nor non-claim where land is in the hands of the king by guardianſhip; becauſe in the one caſe there is not any perſon to make claim; and, in the ſecond, claim cannot be made upon the poſſeſſion of the king.

The 5th point. If the warranty being collateral ſhall bind the remainder in the ſon: and it was argued by all that it ſhould not, becauſe, admitting that the remainder ſettled upon the ſon by the name of *ſeniori puero*, then if af- Warranty.

 terwards,

terwards, when he is born, he takes the possession in remainder, that this being before the descent of the warranty, avoids the warranty: besides, the fine is not a discontinuance of the remainder, because it was in abeyance, and therefore there is not any reason that the daughter should have the benefit of the warranty, because she is in as him who hath an use *en le post*.

The 6th point. If by the words *seniori puero* shall be understood the daughter who was first born, or the son who is the male: and in this the Justices unanimously agreed, that the word *puer* is common as well to the female as the male, and may be taken for both in grammatical construction, and exposition of the civil law: but the best interpreter of the intent in this limitation, is the father himself who made the limitation, and he hath explained by the indenture that the remainder should be to his eldest child; and therefore the Justices all agreed that the daughter is to take the remainder; but *Wraye* said, if the indenture had not been made, then the Justices ought to expound the word *puer* according to the most common intent, which is to signify a male child. *Southcot è contra* as to this, because the daughter being the first upon whom the remainder is aptly enough settled before the birth of the son, she shall be preferred for her priority.

Puer.

Infant.

The 7th. If the lease of an infant, without rent reserved, be *void* or *voidable*: and they all, but *Gawdy*, agreed that it is *void*, because it had not any consideration, but if rent was reserved, it would be only *voidable*. So a feoffment made with the proper hand of an infant is only voidable: and they said that any stranger

ſtranger may take advantage of this by way of allegation, evidence, or otherwiſe.

The 8th. If any averment lies by the daughter againſt the fine, to ſay that *ſeniori puero* in the fine means the eldeſt child. And they all agreed that it did, becauſe it was with [*ove*] the fine to add matter which ſhould explain the words of the fine one way or another. Averment.

The 9th. When the Jury find, that if the entry of the daughter was *not lawful*, the defendant is guilty; if the Judges ought ſo to adjudge him guilty if they find the entry *not lawful*, when in truth it appears to the Juſtices, by the other matters found, that he cannot be guilty of the *ejectment*, becauſe the leaſe was *void à principio*. And in this they all agreed, that the Juſtices are not bound by the concluſion of the Jurors, but may adjudge according to law: and they cited 34 *Aſſ.* where the jurors found a releaſe of an infant, and concluded; and ſo no *diſſeiſin*. So 10 *E.* 4. *fo.* 7. *treſpaſs* againſt the lord for diſtraining, the Jury found for the plaintiff; but becauſe the ſtat. of *Marlbridge* is *non ideo puniatur dominus*, &c. the Court adjudged for the defendant. So 9 *E.* 4. *fo.* 3. *a.* *Tilly* and *Wooddye*'s caſe. Verdict.

The 10th point. If the verdict was imperfect in finding the daughter *primogenitam filiam*; and the ſon *ſecund' genitum filium*: and they all agreed that the verdict was good, becauſe it is true, and the Court is to adjudge the law upon the truth. And ſo, at length, judgment was given *quod querens nihil capiat per billam*.

Where the Jury find matter against law, the Justices will not take notice of it, but will adjudge according to law.

Lee v. Lee, M. 30 & 31 Eliz. Exch. Mo. 268. n. 420. Devise. The devisor hath three sons, F. J. & G. He devises to J. for twenty-one years, for certain purposes, and makes J. executor. If J. die within the term, G. (the plaintiff) to have the like term, and G. to be executor. Devise of the land over to F. in tail, remainder in tail to J. remainder in tail to G. J. entered, F. died without issue. J. had issue P. the defendant, and died within the term, upon which G. entered, and P. ousted him. Qu. If by the descent of the estate of inheritance to J. being in possession of the term, the term was extinct?

Upon an *ejectment* by *George Lee* v. *Patrick Lee*, it was found by verdict, that *Vincent Lee* was seised of land in *Denbigh*, in the county of *Denbigh*; and having three sons, *viz. Francis*, *Jasper*, and *George* the now plaintiff, made his will, whereby he devised the land to *Jasper* for twenty-one years, to the intent of performing his will, and paying his debts, and he also made *Jasper* executor; and if *Jasper* died within the term, he willed that *George* the now plaintiff should have the *like* term as he had given to *Jasper*, and that *George* should also then be his executor. And he devised the land over to *Francis* in tail, remainder in tail to *Jasper*, remainder in tail to *George*, and died. *Jasper* entered, *Francis* died without issue: *Jasper* had issue *Patrick* the defendant, and died within the term; upon which *George* entered, and *Patrick* ousted him. And if by the descent of the estate of inheritance to *Jasper*, being in possession of the term, the term was extinct, they found an *ejectment*. And it was argued by *Cowper* and *Piggot* upon the point, to wit, if the possibility limited to *George* the plaintiff, was prejudiced by the extinguishment of the term in *Jasper*, and the books were cited. And the Court agreed if a term for years be devised to one, and if he die within the term remainder to another, that by descent of the inheritance to the first, unity of possession, his grant, or his forfeiture, the remainder is defeated. But *Manwood* said, and all the Court agreed, that if lands be devised for years to one, and

and if he die within the term, that another ſhall have the reſidue of the term, that no act of the firſt can prejudice the remainder in the ſecond; but, *per Manwood*, it is otherwiſe if one who hath a *term* deviſe his *term* with ſuch remainder. And the reaſon of the diverſity was, that if he deviſe the *term*, it is all one complete eſtate, becauſe power is given to the *firſt* deviſee, over all the term for a certain time; but it is not ſo where the *land* is deviſed, for which reaſon their opinion was againſt the defendant, and with the plaintiff that he ſhould recover: but the judgment was reſpited. And it was moved, that the verdict found that if the term was extinguiſhed in *Jaſper*, it was an *ejectment* to *George*, and it was clearly extinguiſhed in *Jaſper* for his time, by which the verdict found for the defendant. And the Juſtices ſaid, that where the jurors find matter againſt law, the juſtices will not take notice of it, but will adjudge according to law. Verdict.

Of a ſmall variance in a corporate title: of granting a leaſe by a corporation for the purpoſe of bringing an ejectment: alſo of demanding rents.

Ejectione Firmæ. It was found by verdict, that the Dean and Chapter of *Exeter* let the land to *Harvy* for years, rendering rent payable at their chapter-houſe in *Exon*, and for default of payment, the leaſe to be void. *Harvy* aſſigneth his eſtate to the defendant, the rent was in arrear, and not paid, being demanded at their chapter-houſe. The dean and chapter, by the name of the Dean and Chapter of *St. Mary de Exon* (whereas they were Willis v. Jermin, Hil. 31 Eliz. Rot. 674. Cro. Eliz. 167. Variance.

were incorporated by the name of *St. Mary in Exon*) make an indenture of leaſe for twenty-one years to the plaintiff of the land, and in their chapter-houſe put their ſeal to it, and make a letter of attorney to *J. S.* to enter and make delivery of this deed upon the land, which he did accordingly; and if this be a good leaſe, they pray the opinion of the Court.

Harris, Serjeant, prayed judgment for the
1ſt Objection. defendant. *Firſt*, The leaſe of the land is void by *miſnomer* of the corporation, *ſed non allocatur*; for it is no material variance, and ſo
2d Objection. it hath been ruled. The *ſecond* cauſe, that the leaſe was not good, becauſe the dean and chapter let it in their chapter-houſe, by ſetting their ſeal to it; which being a perfecting the deed of the corporation, there can be no other delivery: then the firſt leſſee continuing in poſſeſſion, and they out of poſſeſſion, the leaſe was void, and the delivery after by the attorney, it having a former delivery, is void; *ſed non allocatur*: for there is no other means for a corporation to make a leaſe but this. And *Gawdy* ſaid it is plain, that it is not the leaſe or deed of the corporation until delivery, as of
3d Objection. another perſon. *Thirdly*, The firſt leaſe ceaſeth not till entry, and ſo cannot make a new leaſe. *Wray*, the firſt leaſe doth clearly ceaſe without entry. *Gawdy* doubted. *Fourth-*
4th Objection. *ly*, The leaſe is not good, for the attorney hath not executed his warrant according to his authority; for it was, that he ſhould enter and claim it to the uſe of the corporation, and then deliver the leaſe; and the Jury found, that he delivered it upon the land, but found not that he had entered and claimed, &c. *ſed non allocatur*: for in a ſpecial verdict, the circumſtances of every thing need not ſo ſtrictly be found,

as stated in a plea, &c. and it being found, that by virtue of the warrant he delivered it upon the land, it shall be intended he pursued it duly. *Fifthly*, It is found that they demanded the rent at the chapter-house, where the demand should be upon the land. *Sed non allocatur*; for the demand at the place where it is payable is sufficient, and the plaintiff had judgment. 5th Objection.

Of the difference between pleading, and special verdicts.

In *ejectment* for land in *Devon*, a special verdict was found to this effect: that *J. P.* being seised of land in fee, by indenture between him and *T.* his son of the one part, and two strangers on the other part, in consideration of the natural love and affection which he had for *T.* his son, &c. gave, granted, and infeoffed the two strangers with the said land, to the use of himself for life, remainder to his son *T.* and his heirs males of his body, with remainders over. And covenanted in the said deed with the two strangers, that they should enjoy the aforesaid land to the uses before specified, and this *exonerated*, *freed*, &c. from other *incumbrances*. And the Jury found that this deed was *sealed* and *delivered*, but that it was not executed by *livery* nor by *attornment*. *J. P.* died, and afterwards *T.* died. And if his issue was tenant in tail by force of this use, or seised of the antient fee, was the doubt; and it was resolved *per totam Curiam*, that the issue was seised of the antient fee, and that no use was raised by this deed, and so judgment was given for the plaintiff; and in this case it was resolved,

Hore & Dit, H. 12. Car. 2. C. P. Entr T. 1658, Rot. 1824. 1 Sid. 25.

An use shall not be raised by covenant, nor by declaration, where it was intended to be otherwise raised

2 Vent. 319.

Judgment.

1st Resol. 1st. That no estate passed to the two strangers, because as the deed indented was never executed by *livery*, &c.; nor any use raised to them, inasmuch as there was not any consideration for raising it; and if it was raised to them, it could never come again to *P.* and *T.* his son, because an use could not be raised upon an use.

2d Resol. 2d. If an use should be raised here, it ought to be by way of transmutation of the possession, and this could not be so here, inasmuch as the deed was not executed as hath been said; and this is manifest from the words of the deed, which are *que done, grant & infeoffe. Vide* for this *Foxe*'s case, 8 *Co.* 94. and Sir *Row. Hayward's*.

3d Resol. Mod. Rep. 176. Sid. 82. 3d. The intent of the parties is the foundation of uses, 2 *Inst.* 672. But this intent ought to have three qualifications, it ought to be manifest upon the face of the deed. (Win. 60.) 2. It ought to be according to the rules of law. 3. This intention ought to be taken upon the entire deed *& res & modus habendi* is to be considered, and the case of *Buckler* and *Simonds*, 21 *Jac.* was cited, where the father granted that his land should remain to his son, and held that this would not raise an use, for although there is *res*, yet there is not *modus habendi:* so is the case of *Pitfield* and *Pierce*, 16 *Car.* in *B. R.* where the father granted his land to the use of his son, but no livery was made, and held that no use arose. These resolutions the Chief Justice said were founded upon the book 21 *H.* 7. 18. If I covenant that my son shall have my land, this is held good by reason of the word *covenant*, 1 Co. *Chudley*'s case, and this is cited in *Seimour*'s case in *Dyer*, 96. But *Hob.* denied this; and

(1 Cro. 127. pl. 14. 3 Cro. 394. pl. 19. Winch. 59 Roll's Uses, 788. Winch. 35. March. 50. Sid. 82. 354. 1 And. 25. Vide case of Crosse and Seydamore. Flem. 308.)

according

according to *Hob.* was the opinion of the Chief Justice at present, because a consideration was wanting, But the Chief Justice said that if I will that my son shall have my land in consideration of marriage, although the word *covenant* is wanting, yet the use is well raised. Winch. 60, 1. 1 Cro. 427. 7 Co. 40. b.

4th. It was resolved that an use at this day may not be raised without deed, and to prove this *vide Callard* and *Callard*'s case, 1 *Rep.* 75. a. 12 *El. Dy.* 296. b. And as to the case of a devise of land to uses by will in writing which is not a deed, it was said that this was upon another reason, *&c.* rather upon the statute 32 *H.* 8. of wills, than upon the stat. 27 *H.* 8. of uses. 4th Resol. Poph. 45. cont. v. Sid. 82. 2 Roll's Uses, 786. Poph. 50. Mo. 688. 2 And. 164. 3 Cro. 345.

5th. The covenant in this deed cannot raise an use, which is that J. P. covenants with the two strangers, that they shall enjoy the land to the uses aforesaid, *freed* from all *incumbrances*. 1. Because this is made to strangers. 2. Because this is made between the parties only, without mention of their heirs, and so is intended to be personal. 3. Because if the deed had been good, it would enure to another effect, *viz.* to free the land from incumbrances; and they said that this *very matter* was in *Simonds* and *Buckler*'s case, mentioned before, and was never disputed. 5th Resol.

Nota, That *Bridgman*, C. J. took a diversity between covenants obligatory, and covenants declaratory, for covenants declaratory serve to limit and direct uses, but covenants obligatory, as in the present case, for enjoying this *freed* from incumbrances shall never be construed to raise an use, inasmuch as they have another effect. In this case exceptions were taken to the special verdict, 1. Because the declaration is of land in *Spreton*, and the verdict Winch. 60. Exceptions to verdict. Carter, 80.

verdict in *Spriton*, and in the declaration the land is named *Begly*, whereas in the verdict it is called *North-Begley*. 2. Because it is not found that the lands named in the verdict which the deeds concern, are the same lands mentioned in the declaration.

6th Resol. But it was resolved that the verdict was good, and there is a difference between pleading which is done *per peritos*, and a special verdict, which is the saying of the *Leys gen'*, and therefore, 1. Neither the misprision of a letter, nor the addition of a word, shall hurt in a verdict, so long as *constare potest* that it is the same place and the same land. As to 2. Although they have not found that it is the same land in the declaration mentioned, yet they have found the *entry* and *ejectment* according to the declaration, and there he declares of land in *S.* that he was ejected from land in *S.* And for authority in this case, *vide* the pleading of Sir *G. Brown*'s case, which is in *Coke* 3. (3 Rep. 46.) where *Anthony* is found the son, but not the heir, yet good, and yet, without being heir the plaintiff had not title. And the like exception was taken by *Barkley*, J. (as in our case) in the case of *Cleeve* and *Vere*, reported, although not at large, 1 *Cro.* 458. *V.* 4 *Co.* 65. 9 *Co.* 51. *Hutt.* 55. (Sir W. Jones, 535 Hutt. 56.)

Where the Jury find more than is in issue, and assess damages, &c. if it be error.

(Calvert v. Arnold. M. 14 Car. 2 B. R. 1 Sid. 96. Assault, battery, wounding.—As to the force not guilty;)

Error to reverse a judgment given in *Lancaster*, in an action of *trespass*, where the plaintiff declared for an *assault*, *battery*, and *wounding*; the defendant pleaded, *quo ad* the *force*, *not guilty*, and *quo ad* the *assault* and *battery*, that he

he was removing a market-crofs to a more convenient place, and the plaintiff interrupted him, for which reafon *molliter manus injecit, &c.* and iffue joined. The Jury found the defendant guilty *de injuria fua propria*, and fo recited the entire declaration of the *affault, battery*, and *wounding* (where the *wounding* was not in iffue) and affeffed damages *occafione tranfgreffionis illius ad* 20*l.* and after feveral debates, it was held by the whole Court, except *Windham*, J. that it fhould be intended that they had given damages for every thing in the declaration, *fcil.* the *wounding*, which was not in iffue, and therefore it is error, for the plaintiff might have demurred to the plea.

as to the affault and battery, a juftification. No notice taken of the wounding—Jury find and affefs damages for the whole, tho' the wounding was not in iffue—this is error. Co. Ent. 644. 5 Co. 35. a. Yelv. 5, 6.

And it is fimilar to where the jury find more than the plaintiff declares for, and affefs damages for it. *V. Hob.* 187. and *Co. Entr.* 643.

Vide poft, Hinks v. Clerk.

N. B. Where the jury affefs more damages than laid, plaintiff may enter a *remittitur* for the *furplus*. If he does not, but takes judgment for the whole, it is error, and cannot afterwards be amended.

In all fpecial Verdicts the Judges will not determine upon any matter of fact, but that which the Jury have declared to be true, by their own finding.

Street v. Ld. Roberts al. Sir Wm. Roberts, T. 1658. Sup. Banc. 2 Sid. 86. Extent of land, upon a ftatute acknowledged after a jointure, and before iffue, at extent le-

The cafe found by the fpecial verdict was briefly, that *J. S.* feifed of land in fee, made a jointure on his wife, and afterwards acknowledged a ftatute, and having iffue a daughter within age who was his heir, died. The

land

vied after issue, pending infancy.

land was extended upon the possession of the *feme*.

Resol.

Extent void as to the feme.

Lands cannot be extended whilst in the hands of an infant.

Resolved, 1st. The extent is void as to the *feme*, and cannot prejudice her title, which is paramount the statute, and it was said that if the *feme* die, yet the lands may not be extended whilst they are in the hands of an infant.

Reversion not extendable.

2dly. A reversion may not be extended.

Jury must in special verdicts find the facts to be true.

Vide the next case.

3. In all special verdicts the judges will not determine upon any matter of fact but that which the jury have declared to be true by their own finding. And for this reason the judges will not determine upon an inquisition or *aliquid tale* formed at large in a special verdict, for their finding of this is not an affirmation that all that is in it is true.

Where the Jury find the issue, and more, it is good for the issue, and void for the residue.

Hinks v. Clerk, E. 31 Car. 2. B. R. Ent. H. ult. Rot. 945. 2 Lev. 252.

A stranger puts his cattle in the common, and the commoner distrains them.

Error upon a judgment in *replevin* in *Durham*, where the defendant avowed that *Sunderland* is an ancient borough, consisting of twelve capital burgesses called *Freemen*, and of twelve inferior burgesses called *Stallingers*, and that there is a custom there, that each *freeman*, inhabiting any messuage there, hath common in the place in which, &c. for certain cattle, to wit, for two horses, *and* four cows; and that each *stallinger* inhabiting any messuage there, had common for one cow; and because the plaintiff being a stranger, put his cattle there to the prejudice of his common, the defendant avows the taking. The plaintiff traverses the custom. The Jury find, that the capital burgess, *ss.* the *freemen* have had common for two horses, *or* four cows; and that the *stallingers*

have had common for one cow. But farther they find, that the *wife* of each *freeman* or *ſtallinger* inhabitant, hath the ſame common after the death of her huſband. And that the copyholders, burgeſſes, and ſtallingers have common alſo for *vaches, vitulis, bobus, ſpadonibus, iuvencis, et omnibus ad quantitat' et loco et vice; Anglice* their ſtints, *ut præſent' limitat', et ſi ſuper tota materia, &c.* for the plaintiff, if not, for the defendant; and upon this verdict, judgment was given for the *avowant.* And upon this two errors were aſſigned, 1. That the common is other and variant from that which is pleaded, *ſs.* for *ſheep, calves, heifers, &c.* 2. The cuſtom for inhabitants to have common is bad, and exactly the ſame with *Gateward's* caſe, 6 Co. To which it was anſwered and reſolved, 1. The Jury had found the cuſtom expreſsly as to the firſt, and all that they had found over is void, as the caſe in *Dyer,* in *aſſumpſit* the jury found that the defendant undertook *modo et forma ſi J. S.* ſaid true, this is good, and the *et ſi, &c.* is ſurpluſage and void, and 3 *Cro.* 405. *Gray* v. *Fletcher, et ibid* 546. *Lovelace* v. *Reynolds* are in point. 2. The cuſtom here is not for inhabitants, but for *freemen* and *ſtallingers* who are members of the corporation inhabiting, and the inhabiting in this caſe is merely *reſtrictive, ſcil.* that they ſhall not have common, *unleſs* they inhabit. 3. The cuſtom laid for each member is good, as well as where it is laid in the corporation, to have for them, and each member, as it was in the caſe of *Derby* in *Stable* and *Miller's* caſe. And of ſuch opinion was the Court, and affirmed the judgment. *Holt, junior,* for the plaintiff; *Levinz* for the defendant in error. *Vide ante.*

Each member may preſcribe in right of the corporation.

A new trial granted after a special verdict signed by counsel on both sides.

Namink v. Farwell, M. 1719. Bunbury, 51.
Action for a seisure without probable cause.

Upon an, action brought against an officer for a seisure *absque probabili causa*, there was a special verdict signed by the counsel on both sides; but the Attorney-General, notwithstanding, moved for a new trial, and obtained it: although it was said by the counsel on the other side, that there never was any instance that a new trial was granted after a special verdict which is signed by counsel.

The opinion of the Court as to finding or not finding of robbery.

The King v. Francis, & al'. 8 G. 2. Annaly. 113. 2Stra.1015. Com. Rep 478. pl. 210. See Fost. Cr. Law, 128.
Uncertainty of finding, as to robbery.
The finding.

Lord *Hardwicke*.—Many objections were made to shew that this special verdict is not a charge of robbery; but they have been all over-ruled but one, which was singly to the uncertainty of the finding, *viz.* That it does not certainly appear from these words in the special verdict, "That *Coxe* offering to take "the money up again, the six persons then "and there being present, threatened him if "he took it up to knock out his brains, "whereby *Coxe* then and there was put in "fear, and then and there desisted, and the "six persons then and there immediately took "it up, and got on horseback and rode off "with it; that the money was taken up in "*Coxe*'s presence," so that the Court adjudged it to be a taking from the person: upon this point it has been argued before all the Judges, and my brothers *Carter*, *Comyns*, and *Thompson* doubt, but all the rest are of opinion that

this is not a ſufficient finding to make it robbery.

Robbery is a felonious taking from the *perſon*, putting him in fear, 3 *Inſt.* 68. and therefore all the indictments lay a taking *a perſonâ*, but then the law conſtrues a taking in a man's preſence to be taking from the perſon; ſo *Stamford* 27. *a.* and when the taking ſhall be ſaid to commence is matter of evidence to the jury.

Therefore I would premiſe that we had no doubt as to the definition of robbery, or of what would be evidence thereof to a jury; but all our doubt was as to the uncertainty of this ſpecial verdict.

The ſtriking of the hand here found, does of itſelf exclude all force, for it is that he gently ſtruck, and yet if that had been found to have been done *animo furandi*, it would have made the caſe plain, but for aught appears now, it might be but a ſimple aſſault, or an accidental blow, and without intention to make the money fall.

It is found that *Coxe* was put in fear, and then and there deſiſted to take up the money; but it does not appear how he deſiſted, and it might be by going away, &c.

The jurors alſo find that the ſix perſons then and there immediately took up the money, and got on horſeback and rode off, and upon theſe words our great doubt was; now there is no colour to ſay that the words *then and there* can aid any uncertainty therein, for they only relate to the *venue*, and cannot tie up the fact; ſo then the only material word remaining, is the word *immediately*, and nine of the Judges agree that this is of ſo uncertain a ſignifi- As to the ſignification of the word immediately.

ſignification, that it cannot warrant the Court upon this finding to ſay that the taking was in *Coxe*'s preſence.

It was ſaid that that word excludes all intermediate time and actions, but it will appear that it has not neceſſarily ſo ſtrict a ſignification: *Stevens* in his *Theſaurus* expounds the word *immediate*, by *cito et celeriter*; ſo *Cooper*'s *Dictionary* renders in *Engliſh* immediately, forthwith, by and by; and *Minſhew* gives it as various meanings, and refers it to the word preſently: nor is its ſignification more confined in legal proceedings, as appears even from 2 *Lev.* 77. in the caſe of *Pibus* and *Mitford*, which was cited to the contrary, which ſay thus, though the word immediately, in ſtrictneſs, excludes all *meſne* time, yet to make good the deeds and intents of parties it ſhall be conſtrued ſuch convenient time as is reaſonably requiſite for doing the thing: this word has alſo been frequently uſed in ſpecial verdicts of murder, as in *Oneſby*'s caſe, *Trin.* 13 *Geo.* 1. 2 *Stra.* 766. 2 *R. Raym.* 1485. *Barnard. B. R.* 17. it is uſed four or five times with different applications; and in the ſpecial verdict in *Mawbridge*'s caſe, *Kel.* 120. it is twice uſed in different ſenſes and explained ſo by other words, as in one place it is ſaid immediately thereupon without intermiſſion drew his ſword; and in another place, immediately, in a little ſpace of time between *Mawbridge*'s drawing his ſword, and the giving the mortal wound, &c. Alſo the *ſtat.* of 27 *Eliz. c.* 13. *ſ.* 11. enacts that no perſon robbed ſhall have an action againſt the hundred, except he ſhall, with as much convenient ſpeed as may be, give notice of the robbery to ſome of the inhabitants

habitants of ſome town near the place; and in all declarations on that ſtatute, the averment of ſuch notice is thus, *quod immediate poſt feloniam* the plaintiff gave notice, *&c.* and ſo are all the precedents in *Coke*'s *Entries*, tit. *Hue and Cry* throughout, which ſhews that the word *immediate* there means only with convenient ſpeed, and convenient ſpeed uſed has accordingly been always allowed to be evidence of that averment, and likewiſe writs of *habeas corpus* returnable *immediate*, mean only with as much convenient ſpeed as may be.

And if the meaning of this word is thus unſettled, the Court cannot ſay it abſolutely excludes all *meſne* acts: the circumſtances here found were certainly probable evidence to the Jury to have found that the taking was in *Coxe*'s preſence; but if the Jury have not found that as a fact, we can make no intendment, but as my Lord *Holt* ſays, in the caſe of the *King* and *Plummer*, *Keyling* 111. as the Jury have not found that matter, we are confined to what they have found poſitively, and are not to judge the law upon evidence of a fact, but upon the fact as it is found. And my Lord *Raymond* ſaid to the ſame purpoſe in the caſe of the *King* and *Huggins* *, that it would be of moſt dangerous conſequence to leave inferences to be made in caſe of life by the Judges, where the fact was not found.

2 R. Raym. 1581. 2 Stra. 886. Fitzgib. 187. Barnard. B. R. 397. * Vide ante, IX. (19.)

Therefore the priſoners muſt be acquitted of this indictment.

But we are all of opinion that the priſoners muſt not be diſcharged out of cuſtody, becauſe here is plain charge of grand larceny upon them by this verdict; but however we cannot give judgment of grand larceny againſt the priſoners upon this indictment; for though on

indictment for burglary and felony, the jury may acquit the party of burglary and convict him of felony; or if a person is indicted of felony so circumstanced as to exclude him from the benefit of clergy, the jury may acquit of felony to such a value as would forfeit that benefit, and only find him guilty of felony within benefit of the clergy, and judgment may be given accordingly thereupon; yet here the indictment is for robbery *a persona*, and the only doubt referred to the Court by the Jury is, whether he is guilty of *that* felony and robbery, upon the facts stated by them; but as I say here is a plain charge of grand larceny upon this verdict, the prisoners cannot be discharged, but must be remanded, and then they may be removed by *habeas corpus* to be tried for this grand larceny; and this differs from the case of the *King* and *Burridge*, 3 *Wil. Rep.* 439. 2 *Sess. Cas.* 264. *pl.* 173. last term, because here is a felony appears plainly upon the verdict, but there no felony appeared.

Where an executor shall cover assets by pleading the penalty of a bond to be due, and where he shall only cover assets to the amount of the sum in the conditions: the method of pleading these bonds.

The Bank of England v. Catharine Morrice widow, executrix of Humphrey Morrice, deceased, H. 9 G. 2. Annaly. 219. 2 Stra. 1028. 2 Barnard. B.R. 183. 2 Kel.

Plaintiffs declare upon several *indeb. assumpsits*, of several sums lent, and had and received to the plaintiff's use, by the testator, to the amount of £. 31,432. 10 *s.* and then there is a count in the declaration (upon which the verdict was found) for £. 32,000. had and received to the use of the plaintiffs *ad dampnú* of the

the plaintiffs, £. 35,000. Defendant pleads a judgment recovered, and several bonds and articles with penalties unsatisfied, and particularly a bond entered into by testator to Sir *William Morrice*, Bart. dated 6th of *March* 1727, in the penalty of £. 53,000. conditioned for payment of £. 26,000. in manner therein mentioned, *viz.*

165. pl. 139. Tri. at Ni. Pri. 131. See Andr. 110.

£. 5000. and interest for the whole on the 24th of *June* 1728.

£. 5000. and interest for £. 16,500. on the 24th of *June* 1729.

£. 5000. and interest for £. 11,500. on the 24th of *June* 1730.

£. 5000. and interest for £. 6,500. on the 24th of *June* 1731.

£. 5000. and interest for £. 1,500. on the 24th of *June* 1732.

And £. 1,500. and interest on the 24th of *June* 1733.

And if default should be made in payment of any or either of the said sums, or any part thereof at the times therein limited, that then the said bond should be in full force; and she avers that the two last payments of £. 5,000. and of £. 1,500. and interest have not been made, and that the bond remains in full effect, and not cancelled or satisfied; and another bond entered into by the testator to *Thomas Wilson*, dated 27th of *July*, in the 4 *G.* 2. in the penalty of £. 5,000. conditioned for payment of £. 2,500. upon the 27th of *July* 1731, which she avers is still unpaid. And another bond entered into by the testator to *Duncan Campbell*, dated 25th of *March*, 4 *G.* 2. in the penalty of £. 3,000. conditioned for payment of £. 1,500. on the 1st of *May* then next, which she likewise avers is still unpaid;

and ſhe pleads *plene adminiſtravit.* in this manner, "*Et eadem Catharina ulterius dicit, quod ipſa plene adminiſtravit omnia bona et catall' quæ fuer' præfat' Humfredi tempore mortis ſuæ in manibus ipſius Catharinæ adminiſtrand' præterquam bona & catall' ad valenc' mille libr' quodq; eadem Catharina non habet nec die exhibition' billæ præd' ipſor' gubernat' et ſocietat', nec unquam poſtea habuit aliqua bona ſeu catall' quæ fuer' præfat' Humfredi tempore mortis ſuæ in manibus ipſius Catharinæ adminiſtrand' præterquam bona & catall' præd' ad valenc' præd' mille libr' quæ ſolution' & ſatisfaction' ſeparal' denar' præd' per ſeparal' ſcript' obligator' articulos & judic' præd' debit' & ſolubil' onerat & obligat' exiſtunt. Et hoc parat' eſt verificare unde pet' judic' ſi præd' gubernat' & ſocietas action' ſuam præd' inde verſus eam habere ſeu manutenere debeant, &c.*" Plaintiff's reply, "*Quod præd' Catharina die exhibition' billæ præd' ipſor gubernat' & ſocietat' habuit divers' bona & catall' quæ fuer præd' Humfredi tempore mortis ſuæ in manibus ſuis adminiſtrand' ultra bona & catall' ſufficien' ad ſatisfaciend' ſeparal' denar' præd' per ſeparal' ſcript' obligator' articul' & judic' præd' debit' & ſolubil' unde præd' Catharina dampn' ſua præd' eiſdem gubernat' & ſocietat' ſatisfeciſſe potuit, viz. apud London' præd' in paroch' & warda præd.*" And iſſue is joined thereupon; and at the trial the plaintiffs allowed the defendant to cover aſſets for the penalties of all the bonds and articles except thoſe particularly mentioned above, and on which only the plaintiffs made objection; and the Jury found a ſpecial verdict to this effect.

That the teſtator was at his death indebted to the plaintiffs in £. 28,993. 8 *s.* 1 *d.* for money had and received to their uſe.

That

That the money due on Sir *William Morrice*'s bond, *Wilson* and *Campbell*'s bonds, for the sums in the conditions and for interest together with the penalties of all the other specialties and judgments pleaded, amounts to £. 22,182. 10 *s.*

That at the time of exhibiting the plaintiff's bill, the defendant had assets in her hands to the value of £. 41,152. 2 *s.* 5 *d.*

That there was justly due and owing on Sir *William Morrice*'s bonds at the testator's death, for the sum in the condition and interest £. 6,830. for principal and interest on *Wilson*'s bond £. 2,520. and for principal and interest on *Campbell*'s bond £. 1,540.

That at the time of exhibiting the bill, the defendant had not assets to discharge the penalties of said three bonds.

That deducting the above £. 22,182. 10 *s.* out of the assets found as above, there remains in her hands at the time of exhibiting the bill £. 18,969. 12 *s.* 5 *d.* liable to the demand of the plaintiffs, if the penalties of the said three bonds ought not in this case to be allowed as charges upon the assets.

But whether they ought to be so or not, the Jury pray advice of the Court; and if they are not, they find for the plaintiffs' damages £. 28,993. 8 *s.* 1 *d.* costs 40 *s.* assets to the value of £. 18,969. 12 *s.* 5 *d.*

If otherwise they find for the defendant.

They find every thing else necessary to bring the merits in question.

N. B. The declaration was of *Hilary* term 1731.

This verdict was several times argued at bar, in *Easter* term last, by *Strange* for plaintiffs, and *Bootle* for defendant; in *Trinity* term by

Serjeant

Serjeant *Eyre* for plaintiffs, and Serjeant *Chapple* for defendant; and in *Michaelmas* by *Marsh* for plaintiffs, and *Dennison* for defendant.

Strange argued, That the defendant upon this plea and replication can cover no more assets on the three bonds than for the sums due upon the conditions; that she ought to have pleaded these bonds as single bonds, without setting forth the condition, and that is the method which chiefly occurs in the reports, and then plaintiffs must have over-reached the penalties, because the Court could not have gone out of the record to consider them as penalties only; but as that method used to drive the creditor into a court of equity to discover what the real debt was, therefore the courts of law encouraged another method of pleading, either for the defendant to set forth the condition in the plea, as the defendant here has done, or else for the plaintiff to reply the penalties or judgments were kept on foot *per fraudem*, and upon such an issue they allowed slight evidence to shew a fraud, so that if one judgment was falsified, all the judgments were taken to be falsified likewise, *Carthew*, 196, 431. That the courts recommended this way of pleading, he cites 1 *Vent*. 354. and *Salk*. 312. *Parker* and *Atfield*. That though in the plea she does not say no more is due than the sums in the conditions, yet it must be taken to be so, because *ambiguum placitum accipiendum est contra proferentem*. *Co. Lit*. 303. *b*. that the replication here is good, because in all replications, except *nul award fait*, it is sufficient to meet the plea and falsify the excuses made therein, and that replication of *nul award* depends on a particular reason; *Salk*. 138. *Meredith* and *Allen*;

len; now this replication has done ſo. That the penalty is not to be abſolutely taken as the debt, he cites *Tully* and *Sparkes*, 2 *Stra.* 868. *Paſch.* 3 *G.* 2. where the queſtion was, what was the meaning of the word debts in the bankruptcy act, and the Court held it meant a demandable and juſtly due debt.

Bootle argued, that this caſe muſt be taken according to the ſtrict rules of law, and as it ſtands upon the pleadings as they are, and not as they might have been pleaded. Now the iſſue ſtands thus, ſhe pleads that ſhe has fully adminiſtered, except *quæ ad ſatisfaciend' denar' præd per ſcript' obl', &c. ſolubil' onerat' exiſtunt*: and the replication is, that ſhe *habuit ultra bona ſufficient' ad ſatisfaciend' denar' præd' per ſcript' obl', &c.* So that the iſſue is, whether ſhe had aſſets *ultra* the ſums in the bonds, *&c.* and that cannot be referred by the rules of law to any ſums but the penalty, for every bond is a debt immediately. *Stevens* and *Lofting*, *Michaelmas* 7 *Geo.* 2. and the expediency of pleading will not alter the law. That the penalties are pleadable whether the conditions be due or not. 1 *Roll. Abr.* 925. *Lit.* 2. *pl.* 2. *&* 4. and 3 *Lev.* 368. *Thompſon* and *Hunt*. The plea ſays that the bond is not ſatisfied, which, as the replication does not deny, conſequently confeſſes according to all the rules of pleading.

He cites 3 *Lev.* 368. likewiſe to ſhew that the penalty is a protection for ſo much of the aſſets, unleſs it appears to be kept on foot *per fraudem*. That the caſe of *Vent.* 354. there is this difference from the preſent caſe, *viz.* that there the executor pleaded the teſtator indebted to himſelf, and therefore he was bound to take only what was juſtly due, but where

the debt is to a ſtranger he may always claim the whole, and there is only relief in equity. He cites *Cro. Cha.* 362. *Goldſmith* and *Sydnor*, that a bond for payment of money is pleadable as a debt *in præſenti* even before the day of payment, though it be otherwiſe of a bond for performance of covenants.

Lord *Hardwicke*.—I do not think the queſtion now is, whether in ſtrictneſs the penalty is the debt, but what muſt be adjudged to be the debt upon the pleadings, as they are in this caſe. The iſſue is, whether ſhe has aſſets *ultra* what will ſatisfy the ſums aforeſaid payable by the bonds, *&c.* ſo that the queſtion is, whether the penalties of the bonds, or the ſums in the condition, are meant by the words ſums aforeſaid. The modern way of pleading is for the defendant in the plea to ſet out the bonds with the conditions; but ſure that ſeems to be an argument againſt the defendant in the preſent caſe; for the reaſon of introducing that method was, that the truth might appear. I think it would be moſt unnatural, when ſhe herſelf has pleaded that ſo much is due, for us to lay any weight on her not having ſaid, and no more, unleſs it appears from the whole, that we are to take the penalty to be the debt; and if we are to take that to be the debt in this caſe, there is no uſe in pleading fairly, and ſhe might as well have pleaded as they uſed to do, and then the plaintiff muſt have craved *oyer* and replied *per fraudem*; therefore the queſtion is, whether this replication ſhould have ſhewn that the obligees were willing to take the ſums in the condition; but no caſe has been ſhewn where the plea ſets out the condition, that it ſhould ſay that and no more is due, or that the plaintiff ſhould reply ſpecially,

and I ſhould be glad to ſee a caſe of that ſort; as to *Page* and *Denton*, 1 *Vent.* 354. as *Bootle* obſerves, it is not an authority in this caſe, for there it was a plea of retainer, and when the executor had as much in his hands as was ſufficient for the juſt debt, it was conſidered as a payment of the bond, but ſtill it ſhews that in theſe kinds of pleading the Court is not in all caſes bound to take the penalty to be the debt in law. It is pretty ſtrong for the court, when the defendant has claimed what is to ſatisfy ſo much as due, to preſume that more is due. And it is conſiderable that ſince the caſe of *Thompſon* and *Hunt, in Lev.* the Court, by a general law, *viz.* the ſtatute for amendment of the law, is bound to take notice that the ſum in the condition may be the debt; as to the want of an averment in the replication, that the obligees were willing to accept a leſs ſum, do but conſider what is the evidence required of ſuch willingneſs, only to ſhew that it is a bond with a condition for a leſs ſum.

Serjeant *Eyre* in his argument cites no new caſes.

Serjeant *Chapple*.—That the penalty is the legal debt, for a releaſe of actions diſcharges the penalty, though made before the condition due. *Co. Lit.* 291. 8 *Rep.* 153. *a.* 1 *Brownlow*, 62. That the ſums in the condition are deemed parcel of the penalty, 1 *Roll. Rep.* 405. *Robinſon* and *Francis*. That there is difference between obligation with a condition annexed, and obligation with a defeazance made afterwards, *Cro. Eliz.* 755. 1 *Inſt.* 207. That if ſeveral penalties are pleaded, and aſſets only enough for one, the plaintiff muſt in his replication aver aſſets more than ſufficient to ſatisfy all, 1 *Roll. Abr.* 922. *pl.* 5. That the

use of the defendant's fair pleading in this case is, that plaintiffs in fact take judgment of assets *in futuro*; that the covin is the matter in issue on replication *per fraudem*, *Turner's* case and *Co.* 132. and Sir *William Jones*, 91. where see the manner of such pleading *per fraudem*; he cites for the same 1 *Lutw.* 445. *Bell* and *Bolton.*

Serjeant *Eyre* in reply cites 3 *Lev.* 57. *Lenum* v. *Fooke*, replication would be good if avers assets *ultra* the money in the condition.

He cites *Carthew*, 208. *Page* and *Watts*, that the concluding the plea with a general *plene administravit* will waive the specialties pleaded before; therefore in this case, if the words *sums due and payable*, relate not to the sums mentioned in the condition, the bond to Sir *William Morrice* is waived, since the penalty is not due 'till a breach of the condition, and there was no breach of that condition at the time of the plea.

Lord *Hardwicke*.—This is a new point which my brother *Eyre* has started, and as to that of Sir *William Morrice* keeping it up *per fraudem*, how could the plaintiffs prove that?

Marsh cites *Cro. Cha.* 490, that an executor may release a bond upon receipt of the sum in the condition, and it shall not be a *devastavit* in him.

Dennison cited further *Cro. Jac.* 8. 35. 382. and 3 *Lev.* 311. *Knighton* and *Moreton.*

And now this term, without any further argument, the opinion of the Court was delivered by Lord *Hardwicke*, as follows:

Upon this special verdict two points have been made; First, Whether upon the pleadings in this record, and the matter found by the

the verdict, the penalties of the bonds whereof the days of payment are paſt, or only the ſums mentioned in the conditions, ought in a court of common law, to be conſidered as liens on the aſſets. Secondly, If in theſe reſpects there be any difference between thoſe bonds whereof the days of payment are paſt, and the bond to Sir *William Morrice*, the days of two payments not being come at the time of the plea; and then another queſtion will remain, what judgment muſt be given upon the matter as here found. As to the firſt point, nothing is more certain than that if there be a bond with a penalty, that when the day appointed for payment by the condition is paſt, that the penalty is the debt at law, and relief can be only had in a court of equity; and therefore the defendant might have pleaded ſo as to have had the full penalties allowed her as charged upon the aſſets; but ſhe having in her plea ſet forth the real ſums due, and having, by ſpecial averment, tied herſelf up to them, it has been inſiſted on by plaintiff's counſel, that no more ought to be allowed her to cover aſſets than thoſe leſs ſums, which ſhe has ſhewn were payable by the conditions; but we are all of opinion, * that is my brothers *Page* and *Probyn*, and myſelf, that the penalties of thoſe bonds whereof the days of payment are paſt, ought to be conſidered as the debts due at law, ſo as to cover aſſets: the ancient method was only to plead the penalty, and to leave it to the plaintiff to ſhew that the obligee was willing to accept the debt due in conſcience, and that the penalty was only kept on foot *per fraudem*; and this was ſo conſtantly the method, that there is not any precedent either in the ancient or modern books of entries, of a plea of *plene adminiſtravit*,

* Mr. Juſtice Lee gave no opinion, he being a relation of the defendant.

administravit, where the sums of the conditions of the bonds pleaded are set out; and when this method was first departed from I do not find, but I believe it was when the Judges began to complain of the difficulties plaintiffs were put to by such a disclosing of only part of the case; the first instance whereof is in the case of *Page* and *Denton*, 1 *Vent.* 354. where the court said, that if men would plead their case specially, it would save many a suit in Chancery; the other is in the case of *Parker* and *Atfield*, 1 *Salk.* 312. where the court said that the best way for an administrator to plead, is to plead truly and honestly; and though there is a judgment for a penalty, he ought to plead the judgment, and shew how much is due; from which sayings it was inferred by the plaintiff's counsel in this case, that when the defendant shews what is due, no more assets shall be covered than to the amount of what is so shewn, or else, said they, what is the use of this new way of pleading? But as no authority can be found to prove that the penalty is not to be taken to be the debt, this *obiter* saying in the books shall not settle it; and yet notwithstanding this manner of pleading will remain to be of great use. Upon the old method nothing appears in the plea but the penalty, and the plaintiff is not thereby enabled to tell whether it be a single bond, or with a condition, and the defendant is not bound to make a *profert* of the bond pleaded, not being supposed to have the same in his custody, much less is the obligee in such bond bound to produce it; and if there were any collusion between the obligee and the executor who pleads such bond, the plaintiff might perhaps be never able to come at the truth of the

fact,

fact; in order to make a proper replication, which would oblige him to resort to a court of equity to discover and make a proper case at law, whereas by setting out the condition in the plea all these delays are avoided, for the plaintiff sees what is the real debt, and may, upon enquiry, know whether the penalty is kept on foot *per fraudem*; and this is sufficient to satisfy the saying of the court in the case of *Page* and *Denton*, that such pleading will save many suits in Chancery; for so it will, and will enable the plaintiff to have the equity of his case even in a court of common law, but to require more might be perilous to an honest executor, for the penalty is to secure interest, costs, and charges to the obligee as well as the sum mentioned in the condition; and the executor of the obligor is likewise intitled to this out of the assets, and therefore it is impossible to settle and adjust that at law, without confounding law and equity; and disputes may happen between the obligee and the executor, which may oblige the executor to apply to a court of equity, of which he must pay costs, as if he should apply to equity to oblige the obligee to take only his real debt; or if he would take the benefit of the statute for amendment of the law, and pay the money really due into court, he cannot do that till an action is brought against him, and then too he must pay costs; and therefore if the matter were to be taken thus strictly upon the plea, the executor might be left to pay such interest and costs out of his own pocket, though it would be no inconvenience to oblige the obligee, if he were plaintiff to take his real debt; therefore it is better it should be open to equity in such cases, than for us to blend

the rules of law and equity together. This is the ſenſe in which that general expreſſion which has been ſo much relied on for plaintiffs ſhould be taken. There were cited for plaintiffs *Cro. Cha.* 490. *Knyveſton* and *Latham*, but the caſe is really an authority againſt them, for it was held that the penalty of the bond is the debt at law, and relief could be had only in a court of equity; and that was confirmed, as the book ſays, by the judges at the table in Serjeant's-Inn; though it was held by two judges, that a releaſe by an executor of full age, having received the principal and intereſt which was due in equity, ſhould be only aſſets for the intereſt and money received, and not be a *devaſtavit* for the reſidue; and it was for this latter opinion only that the caſe was cited; but there is a great deal of difference between charging an executor with a *devaſtavit* for not receiving a penalty which a court of equity would not ſuffer him to receive, and letting him have the advantage of a penalty to cover aſſets, as in this caſe. The caſe of *Page* v. *Denton*, 1 *Vent.* 354. was likewiſe cited for the plaintiff; and at firſt ſight it ſeemed a ſtrong caſe for him, but upon conſidering it, it is otherwiſe, for it is a plea of a retainer by an executor himſelf, and not of payment to a third perſon; ſo that it would have been abſurd to require a replication that the obligee was willing to accept a leſs ſum, or that the executor kept the bond on foot *per fraudem*; and this was the true ground of that caſe; and the court took care to diſtinguiſh that caſe from the caſe of a forfeited bond ſtanding out to a ſtranger, ſo that caſe is like the caſe of *Thompſon* and *Hunt*; that caſe was a plea by an executor of judgments obtained againſt him

upon ſeveral bonds made by the teſtator, and replication that the obligations were with conditions to pay leſs ſums, and that the defendant had aſſets to pay the plaintiff *ultra* what would ſatisfy the debts and judgment in his plea, and on demurrer to the replication it was held good, becauſe the penalties are the legal and due debts, and the plaintiff might have aided himſelf by pleading that the bonds were kept on foot by fraud and covin, and upon iſſue of the fraud, the plaintiff might give in evidence ſuch matter as would ſerve him to avoid the penalties, and ſo judgment was given for defendant: and that caſe of *Thompſon* and *Hunt* is affirmed to be law in *Bell* and *Bolton*, 1 *Lutw.* 450. to diſtinguiſh that caſe from this it was ſaid, that the ſeveral leſs ſums were ſet out in the replication in that caſe, but that here they are ſhewn by the defendant herſelf in the plea, and that therefore it muſt be underſtood in this caſe that ſhe herſelf inſiſts on more being due; but that makes no difference, for when in *Thompſon* and *Hunt* the defendant averred in his rejoinder, that he had not *ultra* to ſatisfy the penalties, it was an admiſſion of the replication, and the ſame as if the defendant had himſelf ſet out the leſs ſums; another difference was made from the different manner of pleading in this caſe, becauſe the defendant in pleading the ſeveral bonds has added that the ſums in the conditions remain ſtill due and unpaid, and then concludes her plea, that ſhe has not aſſets *ultra* what will ſatisfy the ſeveral ſums by the bonds, articles, and judgments due and payable, and therefore they would have it that the ſums ſaid in the concluſion to be due and payable on the bonds, mean the ſums before

 to

to be due thereon,' *viz.* the leſs ſums; but in anſwer to that, the words in the concluſion of the plea are not the ſame as in the ſeveral averments; in the averments the words are, *due*, and in the concluſion the words are, *due and payable*, which in law is the penalty; but there is a more ſubſtantial anſwer to be given to that, for the defendant has averred that the penal ſums of the articles remain due and unpaid as well as the ſums of the bonds; and as to the articles at leaſt the words muſt of neceſſity mean the penalties, and it would make ſtrange confuſion in the ſame plea to conſtrue the ſame words to refer ſometimes to penalties and ſometimes to the leſs ſums, ſometimes to the debts at law, and ſometimes to the debts in equity; therefore, if thoſe words are to be applied to the penalties in the articles, they ought likewiſe to be applied to the penalties of the bonds; it was likewiſe objected that there is no precedent of a replication *per fraudem*, where the defendant's plea ſets forth the particular ſums due by the condition, but the anſwer that has been given to that is ſufficient, that neither is there any precedent of ſuch a plea.

As to the ſecond point, we are of opinion that the defendant can be allowed no more upon Sir *William Morrice*'s bond than is due in equity and conſcience, for it appears that the days of payment of the two laſt inſtalments were not come, and we conceive that upon this plea all the prior inſtalments muſt be taken to be ſatisfied; then the queſtion will be, if a bond be pleaded with a penalty conditioned to pay a leſs ſum at a day to come after the plea, whether it ſhall be allowed to cover aſſets to the amount of the penalty; it muſt be allowed

lowed that such a bond is pleadable; so is *Cro. Cha.* 363. and 1 *Rol. Abr.* 925. *pl.* 2. but then it will cover assets no further than the amount of the sum payable in conscience, for the bond not being payable, nothing is due at the time of the plea, and it would be absurd to let the executor cover assets for a debt which cannot be recovered against him; and this is proved by the way of pleading in such cases; so in *Cro. Eliz.* 315. the defendant avers that he has no assets *ultra* the money due by the condition, and not *ultra* the penalty; so 3 *Lev.* 57. *Leman* and *Fooke*, judgment given for the defendant, because plaintiff in his replication did not say that the defendant had assets *ultra* what would pay the money in the condition, which directly admits that if the replication had averred assets in the defendant's hands *ultra* to pay the less sum, it would have been good. If we consider too how this differs from a forfeited bond in the reason of the thing: this bond the executor may pay, by paying the less sum when the day comes, for she has admitted assets in this case by pleading it; so is 1 *Salk.* 198. and 312. and if she has assets it is her duty to pay it; and if she does not, but lets the interest run upon it, having assets, that will be a *devastavit*; so is 1 *Vent.* 198. 2 *Lev.* 39. it differs also from a forfeited bond in this, that the plaintiff could not reply *per fraudem*, for it was no fraud in her not to pay a bond which was not due.

But the greatest difficulty is, what judgment must be given in this case, for upon this verdict there are two objections; 1*st*, That the assets found liable to satisfy the plaintiff, are found in one intire sum, supposing all the penalties are not to be allowed as charges upon

the assets, and no distinction is made in the verdict as to the penalties of the bonds, and the assets to be liable, if some are allowed and others not; but as the Court is now of opinion that some of the penalties ought to be allowed and not others, that will reduce those assets in defendant's hands, which are really liable to the plaintiff's demand. The other objection is, that the interest included in the sums found to be really due upon the bonds, is only carried on to the testator's death; and yet it appears that the executor must pay interest on Sir *William*'s bond, to the time of payment of the two last instalments, for which reasons the Court cannot give judgment for the intire sum found by the Jury; but then the question is, whether we can sever the sum found by the Jury, or whether the verdict can be amended, or whether there must be a *venire facias de novo* awarded.

How special verdicts shall be construed; may be rectified in point of computation.

To which purpose the Court set a further day in this term for hearing counsel upon the said points, and then *Strange* for plaintiff argued, "That the Court may give judgment as the verdict now stands, and for that purpose may compute what allowance is to be made to the defendant, and so give judgment for the plaintiff for such sum as he appears to be lawfully intitled to upon this record; and he cited *Hob.* 54. *Foster* and *Jackson*, that howsoever the verdict may seem to stray, yet if a verdict may be concluded out of it to the point in issue, the court shall work it into form and make it serve; and for the same purpose he cited 1 *Sid.* 5, 27. and *Carter*, 80. that the court will set verdicts right, which give greater damages than are declared for; and cites a precedent of that sort in *Thompson*'s *Entries*,

Entries, fo. 458. he cited also the *King* and *Hayes*, *Hil.* 1 *G.* 1. 2 *Stra.* 843. 2 *R. Raym.* 1518. *Barnard. B. R.* 31. he was indicted for three facts; 1*st*, For forging a bond; 2*dly*, For publishing such bond; 3*dly*, For publishing a bond generally, knowing it to be forged; a special verdict was given that he forged a bond in the words and figures following; that he published the same bond knowing it to be forged; and said nothing as to the third fact. And it was objected, that as the verdict neither found the defendant guilty or not guilty as to that, that no judgment could be given; but the court held that upon the facts stated to them, they must adjudge the defendant guilty as to the two first, and not guilty as to the last, and that they were to do what the jury ought to have done; he likewise cited a precedent from *Townsend*'s *first book of Judgments*, 165. which he would have to be a precedent for this."

Serjeant *Chapple*, for defendant, argued, " That no judgment can be given upon this verdict, for there will be no *quantum* of assets plainly appearing wherewith to charge the defendant; and he cited 2 *Roll. Abr.* 693. *Lit. f.*— *Cro. Cha.* 549. *Crispe* and *Pratt*, *Bro. Exe.* 141. 1 *Roll. Rep.* 234.

Lord Hardwicke. — The rules which have been laid down as to special verdicts must be allowed; on the one hand that the facts found can only warrant the judgment; on the other, that when the matter sufficiently appears upon the whole, the Court may so mould and form it as to give a proper judgment resulting from the whole taken together, and to this purpose the words in

Hob. are very right: the only question here then is, whether sufficient facts are found to give judgment upon; and as to the doubt which the Jury make, the Court is not strictly tied to that, nor by the conclusion they make, but are, if necessary, to distribute the facts found, and to give a proper judgment upon the whole taken together, even though it were to contradict the conclusion, 2 *Roll. Abr.* 706. *pl.* 33. which is cited and allowed to be law in *Hard.* 347. and I am of opinion that it does sufficiently appear upon this verdict what allowance ought to be made the defendant, and that without any intendment; for as the Jury have found the penalties and conditions, the rest is but matter of computation, and they have found the interest to be at the rate of *£.5 per cent.* and the *terminus a quo* to be from the death of the testator, which facts being found, all that remains is computation, which the Court has always had power to make or alter; therefore I think there is sufficient found for us to give judgment upon; but the question is, in what manner it should be entered; and as to that I think the precedents that have been shewn are stronger than the present case, for if damages which are intire may be severed, *a fortiori* assets may. There is a precedent in *Townsend*'s *second book of Judgments, fo.* 151. which might be made agreeable to this case, and that book was printed by the authority of Ld. Ch. J. *Vaughan*, and is of better authority than *Thompson*'s *Entries*. There are likewise in the same book, *p.* 117. a judgment in ejectment with a *remittitur*, and *p.* 189. another of the same in *quare impedit*; therefore

fore I think judgment ought to be specially entered for the plaintiff.

Page and *Probyn accord:* but as it was to be a special entry, a rule was, that the parties should attend a judge to settle the entry.

The entry of the judgment was thus:—
"Whereupon all and singular the premises
"being seen and fully understood by the
"Court here, inasmuch as it appears to the
"said Court here, that the penal sums in the
"aforesaid two bonds to the said *Thomas Wil-*
"*son* and *Duncan Campbell* ought in this case
"to be allowed as charges upon the assets of
"the said *Humphry Morrice*, and that the pe-
"nal sum in the said bond to the said Sir
"*William Morrice* ought not in this case to
"be allowed as a charge upon the assets of the
"said *Humphry Morrice*, but that only the
"principal sum of £. 5,000. payable on the
"said 24th day of *June*, in the said year of
"our Lord 1732, and the further sum of
"£. 1,500. payable on the said 24th day of
"*June* in the said year of our Lord 1732, to
"the said Sir *William Morrice*, with all interest
"for the said two last-mentioned sums from
"the said 24*th* day of *June* in the said year of
"our Lord 1731, to the respective days of
"payment thereof, ought in this case to be
"allowed as charges upon the assets of the
"said *Humphry Morrice*; therefore by the
"assent of the said governor and company of
"the bank of *England*, the sum of £. 4,310.
"being deducted out of the said sum of
"£. 18,969. 12*s*. 9*d*. by the Jury aforesaid
"in form aforesaid found, whereby the assets
"in the hands of the said *Catharine Morrice*
"on the day of exhibiting the plaintiff's bill

"liable

"liable to the demands of the said plaintiffs, "are only the sum of £. 14,659. 12*s*. 9*d*. it "is considered by the Court, that the afore- "said governor and company do recover "against the said *Catharine* their said da- "mages to £. 28,993. 8*s*. 1*d*. and also the "said 40*s*. by the Jury aforesaid in form "aforesaid assessed, and likewise £. 198. 7*s*. 7*d*. "to the said governor and company at their "request, for their costs and charges aforesaid "by the Court here of increase adjudged, "which said damages amount in the whole "to the sum of £. 29,193. 15*s*. 8*d*. to be "levied of the goods and chattels of the said "*Humphry Morrice* deceased, at the time of "his death in the hands of the said *Catharine* "to be administered, if she hath so much in "her hands, and if she hath not so much in "her hands, then £. 200. 7*s*. 7*d*. parcel of "the damages aforesaid, to be levied of the "proper goods and chattels of the said *Ca-* "*tharine*, and that the said *Catharine* be in "the mercy of the Court; and that the said "governor and company be also in the "mercy of the Court for their false clamour "against the said *Catharine* for the residue of "the aforesaid premises, whereof the said *Ca-* "*tharine* is by the Jury aforesaid in manner "aforesaid acquitted, and that the said *Catha-* "*rine* go therefore without day, and so "forth."

Whatever

Whatever is written in the margin of a policy of insurance is a warranty, and must be literally complied with.

This was an action upon promises brought by the plaintiff (an under-writer) to recover back the amount of a loss which he had paid upon a policy of insurance.

De Hahn v. Hartley, Trin. 26 G. 3. B. R. Durnford and East, 1 V. 343. Assumpsit, attempts of an under-writer to recover back amount of loss he had paid in his own wrong, the insured not having complied with the terms of the policy, of which the plaintiff was ignorant at the time of the payment.

Plea the general issue.

This was tried before *Buller*, J. at the sittings after last *Easter* term at *Guildhall*, when the Jury found a special verdict, which stated,

That the defendant on the 14*th June* 1779, at *London*, gave to one *Alexander Anderson*, then being an insurance broker, certain instructions in writing, to cause an assurance to be made on a certain ship or vessel called the *Juno*, which were in the words and figures following; " Please get £. 2000. insured on " goods as interest may appear, slaves valued " at £. 30. *per* head, comwood £. 40. *per* ton, " ivory £. 20. *per* hundred weight, gum copal " £. 5. *per* pound, *at and from Africa to her* " *discharging port or ports in the British West* " *Indies; warranted copper sheathed, and sailed* " *from Liverpool with fourteen six-pounders,* " (exclusive of swivels, *&c.*) 50 *hands* or " upwards, at 12 not exceeding 15 guineas. " *Juno—Beaver. S. Hartley* and company, " *June* 14th, 1779."

That the said *Alexander Anderson*, in consequence of the said written instructions from the said defendant, on the said 14th *June* 1779, at *London* aforesaid, *&c.* did cause a certain writing or policy of assurance to be made on the said ship or vessel called the *Juno*, in the words and figures following; (reciting the

 policy)

policy) which was upon any kind of goods and merchandizes, and alſo upon the body, tackle, apparel, &c. of and in the ſhip *Juno at and from Africa, to her port or ports of diſcharge in the British Weſt Indies, at and after the rate of £. 15. per cent.*

The verdict after reciting two *memoranda*, which are not material, then proceeded to ſtate, *that in the margin of the ſaid policy were written the words and figures following*; "*Sailed* "*from Liverpool with* 14 *ſix-pounders, ſwi-* "*vels, ſmall arms, and* 50 *hands or upwards,* "*copper-ſheathed.*"

That on the ſaid 14th *June* 1779, and not before, at *London* aforeſaid, &c. the plaintiff under-wrote the ſaid policy for the ſum of £. 200. and received a premium of £. 31. 10*s.* as the conſideration thereof.

That the ſaid ſhip or veſſel called the *Juno* ſailed from *Liverpool* aforeſaid, on the 13th *October* 1778, *having then only* 46 *hands on board her*, and arrived at *Beaumaris*, in the Iſle of *Angleſea*, in ſix hours after her ſailing from *Liverpool* as aforeſaid, with the pilot from *Liverpool* on board her, who did pilot her to *Beaumaris* on her ſaid voyage; and that at *Beaumaris* aforeſaid the ſaid ſhip or veſſel took in ſix hands more, and then had, and during the ſaid voyage, until the capture thereof hereinafter mentioned, continued to have fifty-two hands on board her.

That the ſaid ſhip or veſſel in the ſaid voyage from *Liverpool* aforeſaid to *Beaumaris* aforeſaid, until and when ſhe took in the ſaid ſix additional hands was equally ſafe, as if ſhe had had fifty hands on board her for that part of the ſaid voyage.

That divers goods, wares, and merchandizes of

of the ſaid defendant, of great value, were laden and put on board the ſaid ſhip or veſſel, and remained on board her until and at the time of the capture thereof hereinafter mentioned. And that on the 14*th March* 1779, the ſaid ſhip or veſſel while ſhe remained on the coaſt of *Africa*, and before her ſailing for her port of diſcharge in the *Britiſh Weſt India Iſlands*, was, upon the high ſeas, with the ſaid goods, wares, and merchandizes on board her as aforeſaid, met with by certain enemies of our Lord the now King, and captured by them, *&c.* and thereby all the ſaid goods, wares, and merchandizes of the ſaid defendant, ſo laden on board her as aforeſaid, were wholly loſt to him.

That when the ſaid plaintiff received an account of the ſaid loſs of the ſaid ſhip or veſſel; he paid to the ſaid defendant the ſaid ſum of £. 200. ſo inſured by him as aforeſaid, not having then had any notice that the ſaid ſhip or veſſel had only forty-ſix hands on board her when ſhe ſailed from *Liverpool* as aforeſaid. But whether upon the whole matter, *&c.*

Law, for the plaintiff, was ſtopped by the Court.

Wood, for the defendant,

Admitted, that a *marginal note* in a policy of inſurance *may be a warranty*, but contended, that this was diſtinguiſhable from the caſe of *Bean* v. *Stupart* (a), and all the other caſes on the ſubject. In the caſes decided, it has always been a warranty of a fact relating to the voyage inſured: but in the preſent caſe, that which is written in the margin has no relation whatever to the voyage; for it relates merely to the force of the ſhip at *Liverpool*, before the voyage commenced, and is totally

(a) Dougl. 11

X unconnected

unconnected with the risque insured. The policy is, "at and from *Africa* to her port of "discharge in the *British West Indies*;" and the warranty is from *Liverpool*; which is antecedent to the voyage insured, and is merely a *representation* of the state of the ship when she set out on her voyage from *Liverpool*. Then, if it be only a representation, it is immaterial whether complied with, because it is found by the verdict that the ship was equally safe with the number of hands she had on board, as if she had had the whole number contained in the warranty. The warranty then can only relate to her being *copper-sheathed*: that part indeed was extremely material, because otherwise the risque would have been considerably encreased; and that extended to the voyage insured: but the other part of the marginal note was merely a representation, because the manner of sailing from *Liverpool* was unconnected with the risque insured.

But even if the Court should consider the whole as a warranty, it has been substantially complied with.

Lord Mansfield, *Ch. J.*—There is a material distinction between a warranty and a representation. A representation may be *equitably and substantially* answered: but a warranty must be strictly complied with.

Supposing a warranty to sail on the 1st of *August*, and the ship did not sail till the 2d, the warranty would not be complied with.

A *warranty in a policy of insurance is a condition* or a contingency, and unless that is performed, there is no contract.

It is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it is literally complied

complied with. Now in the prefent cafe, the condition was, the failing of the fhip with a certain number of men; which not being complied with, the policy is void.

Ashhurst, *J.*—The very meaning of a warranty is to preclude all queftions whether it has been *fubftantially* complied with: it muft be *literally* fo.

Buller, *J.*—It is impoffible to divide the words written in the margin in the manner which has been attempted; that that part of it which relates to the copper fheathing fhould be a warranty, and not the remaining part. But the whole forms one entire contract, and muft be complied with throughout.

Judgment for the plaintiff.

ESSAY. IV.

Of Trials at Bar.

Vide ante Essay II. Head III. The *Queen v.* the *Bailiffs* and *Burgesses* of *Bewdley*. D° IV. *Bright, exor.* of *Crisp v. Eynon.* D° IX. (3.) *Rex v. Woodfall.* D° IX. (6.) *Argent v.* Sir *Marmaduke Darell.* — *Leighton v.* Sir *Edward Leighton.*—*Smith, ex. dim. Dormer v. Parkhurst*; *et* IX. (8.) *Richards v. Symes.*

If a new trial shall be granted after a trial at bar.

A VERDICT contrary to the opinion of the Court.

Upon a trial at bar by a *Middlesex* Jury, where the issue was whether the copyholders of a manor (of which Sir *George Reynolds* was seised) ought by the custom, upon their admittance, to pay fines, certain, or uncertain? And upon the whole evidence (although precedents were produced both ways) the Court was satisfied that the copyholders ought to pay uncertain fines; but the next morning the Jury came and gave their verdict that the copyholders ought to pay certain fines; and for this cause, and also upon *affidavit*, that several of the principal freeholders named in the *venire facias* by *Horne*, secondary, were never summoned

Wheeler v. Honour, M. 13 Car. 2. B. R. 1 Sid. 58. 1 Keb. 154, 166. Ray. 41.

Question if copyholders of a manor ought upon their admittance to pay fines certain or uncertain?

Obj. several freeholders named in the

venire facias were not summoned.

1 Keb. 40, 41

moned, it was moved two days after to have a a new trial; but because there was full evidence, the Court would not grant a new trial (unless the other party would consent) for it was said that trials at bar were solemn and of great authority; and although the Court was not satisfied, yet the Jury, who were the proper judges of the fact, were well satisfied. And it was not known that more than two new trials had ever been granted, after a trial at bar; one of which was in this case; three *Welshmen* were robbed in *Surrey*. One brought his action upon the statute, and a verdict was found *for* the hundred: the other two brought their actions, and verdicts were found *against* the hundred (all of which were tried at this bar *Anno* 1657) and upon this the court granted a new trial in the first, and they had great reason so to do, for there were two verdicts against one. The other was granted because *excessive damages* had been given for words, *viz.* £. 115.

Three actions against an hundred by three Welsh drovers.—One verdict for, two verdicts against the hundred.—New trial in the first, after a trial at bar.

If debt lies for a fine against a copyholder, 1 Sid. 176, 177.

Nota, It was said by *Twisden* and *Windham*, Justices, and not denied by any one, that, in this case, the lord might bring an action of debt against the copyholder, and so he is not without remedy: and *Twisden* said that so it was held by *Forster*, Justice, 15 *Jac.* which was not denied, but it was said that the opinion of *Bacon* was, that the lord could not have debt for a fine against his copyholder.

Trial

Trial at bar granted, where a justice of the King's Bench, or a master in Chancery is concerned.

Sir *William Morton*, one of the justices of this bench, brought debt against *H.* and *S.* for tythes, *scil.* for not setting them out, *&c.* and in this action the title of a parsonage in the county of *Oxford*, which *M.* had as executor to his son, was to be in question, and a motion was moved for a trial at bar the next term, which was granted without any *affidavit*, because, if one of the justices of the bench, or a master in *Chancery* is concerned, it is a good cause for a trial at bar, be the value what it will; and a trial was granted, and the next term it was tried, and it was held as before, that debt lies upon the *stat.* 2 *E.* 6. *by* executor for tythes, but not *against* an executor.

Morton v. Hopkins and Spencer, H. 20 and 21 Car. 2. B. R. 1 Sid. 407.

1 Vent. 30.

Executor may have debt upon the stat. 2 E. 6. of tythes, but it does not lie against an executor. Hob. 188.

There was a verdict for the plaintiff, but he absented himself from the Court, the day of the trial, although he was present at other times when the cause was moved.

Information for extortion against a clerk of assize, shall be tried at the bar.

Difference between a cessat processus, *and* nolle prosequi, *by the Attorney General.*

An information was exhibited here against *B.* for extortion in the office of clerk of the *assize*, in the county of *York*, and it was moved, after the defendant had pleaded *not guilty*, to have a trial here at bar, and it was opposed by the King's counsel, because they had a great

Rex v. Berson, T. 21 Car. 2. B. R. 1 Sid. 420.

Information for extortion. 1 Vent. 33. 2 Keb. 541.

 number

number of witnesses in *Yorkshire*, and it would be a great expence to the prosecutor to bring them up here, and that it was well known in the country, whether he was guilty or not. But, because this was a great offence, if he was guilty of it, the *senior* judge of the circuit would have his place, and because nothing ought to be tried, before those who are to have advantage by it, it was ordered that the trial should be at bar; and this term the Jury appeared, and whilst they were swearing, the King's attorney came into court and said that he had entered a *cessat processus:* but the Court notwithstanding proceeded in swearing the Jury, and told the Attorney-General, that he should enter a *nolle prosequi* before they would stop, and then the Attorney-General commanded the clerk of the Crown to enter a *nolle prosequi*, which was done, and the Jury discharged. 1 *Cro.* 254.

The jury appearing, shall not be dismissed upon a cessat processus, without a nolle prosequi.

Trial at bar the last paper day.

Lord Bellamont's case, Pasch. 12 Will. 3. B. R. 2 Salk. 625.

The Attorney-General moved for a trial at bar last paper-day in the term, in an action against the governor of *New York* for matter done by him as governor; and granted, because the King defended it.

Where the venue is in London, *there cannot be a trial at bar.*

Anonymous, Pasch. 5 W. & M. B. R. 2 Salk. 644.
Trial at bar. Vide ante.

A cause cannot be tried at bar where the action is laid in *London*, by reason of their charter.

Trial

Trial at bar where to be granted, or denied.

Where there is value or difficulty, we are bound of common right to grant trials at the bar. *Inquisitiones de grossis et pluribus articulis, quae magna indigent examinatione capiantur coram Justiciariis de Bancis, Stat. West.* 2. *c.* 30. *per Holt, C. J.* yet *Trin.* 1 *Ann.* it was denied, because the plaintiff was poor, unless the defendant would agree to take *nisi prius* costs. *Et postea scil. Trin.* 4 *Ann. B. R.* between the trustees of my Lady *Sandwich* and my Lord *Sandwich*, though the estate was £.3000. *per annum*, a new trial at bar was denied, because the title of the lessor of the plaintiff being from the defendant himself, there would be nothing to do but to prove the executing of a conveyance.

Lord Sandwich's case, Trin. 2 Will. 3. B. R. 2 Salk. 648. Vide ante, & post.

When a trial at bar is to be moved for.

If *H.* would have a trial at bar in *Easter Term*, he ought to move for it in *Hilary Term*; if in *Michaelmas Term*, he ought to move for it in *Trinity Term*, except where lands lie in *Middlesex*; and anciently there was no other notice given of such trial, but the rule in the office; but now there must be fifteen days notice. *Per Holt*, C. J.

Turner v. Barnaby, Pasch. 1 Ann. B. R. 2 Salk. 649. Vide ante et post.

Trials at bar not denied to officers of the court, or barristers.

Upon a *scire facias* brought against Sir *Samuel Astrey*, for his place of clerk of the crown in the Court of King's Bench, and issue joined

Sir Samuel Astrey's case, H. 2 Ann. B. R. 2 Salk. 651.

 thereupon;

Vide 2 Mod. 651. 6 Mod. 123. Salk. 625. 2 Keb. 133, 164. 1 Cro. 248.

thereupon; Sir *Samuel Astrey* moved that the issue might be tried at the bar. The Attorney-General opposed it; but the Court said, a trial at bar was never denied to any officer of the court, nor hardly to any gentleman at the bar: and though Mr. Attorney was never bound to consent to a trial by *nisi prius* in the Queen's case, yet they did not see how he could refuse a trial at bar, where it was reasonable to try it there; for the stat. *West.* 2. *cap.* 30. is *atterminentur*, that they may be determined there, *qui magna indigent examinatione.*

A new trial refused after a trial at bar, though the Court much dissatisfied with the Jury.

Gay v. Cross, T. 1 Annæ, in B. R. 7 Mod. 37. 1 Salk. 130. Mandamus to swear in a common-council-man of Totness. Corporation. Verdict. Trial at bar.

The plaintiff brought an action on the case for a false return to a *mandamus* to swear him *common-council-man* for the borough of *Totness*, which, by charter from *Queen Elizabeth*, the manner of their election was chalked out for them; and a usage was given in evidence to a jury at the bar, that the election had gone quite contrary, which usage was allowed to be good evidence of a by-law whereupon it was founded? So the counsel on both sides consented to have it found specially, and to have it determined by the Court; whether such a by-law and a long usage pursuant to it, could alter the direction, or rather annihilate the direction of the charter? And the Jury having given their verdict in private over night, said, that they had found the matter specially, and the next day in court delivered their verdict for the defendant generally, and would give no reason for it, nor be moved to depart from it. And hereupon a new trial was moved for, and the case of

Wood

Wood and *Gunston* in *Stiles*, and a case of the *Welsh* drovers were quoted for new trials, after a trial at bar. And though the Court were very much dissatisfied with the Jury, and *Holt* said, he never had known the like, and that he would have but little value for the verdict of a jury that would not, at a judge's desire, declare the reason which had induced them; and that as the judges do publicly declare the reasons of their judgments, and thereby expose themselves to the censures of all that be learned in the law, and yet there is no law obliges them to it, but it is for public satisfaction; so the jury ought, for the same reason, to declare the reason of their verdict, when required by the court. Notwithstanding all this, it being a trial at bar, the Court would not grant a new trial.

V. ante VI. V. ante in the case of Wheeler v. Honour.

Qu. If this determination was not wrong?

Application to put off trial refused, the affidavit being insufficient.

Affidavits to put off a trial at bar, set down for the first *Tuesday* in term, upon account of the witnesses being not likely to be there, denied; for that it was not sworn endeavours had been used in such convenient time to have them, that without an unforeseen accident they would be at the trial at the set time.

Gravenor v. Fenwick, H. 1 Annæ in B. R. 7 Mod. 121. Trial.

New trial denied after trial at bar, upon insufficiency of the affidavit.

After a trial at bar, and verdict for lessees in ejectment, a new trial was moved for upon the

Gravenor al' Grovenor and Fenwick, H.

1 Annæ in B. R. 7 Mod. 156. 2 Salk. 650. S. C.
New trial denied after trial at bar.
Affidavit.

the merits of the cause, and also upon an affidavit brought into Court containing in substance, that the defendant's witnesses were kept back by a report spread in *Holland*, where they were in their way to *England*, that the witnesses that were already come over, had been laid by the heels; but the *affidavit* did not name any who had spread the report, or that it was by the agents or persons employed by *Fenwick*. And though the Court were dissatisfied with the verdict, upon several reasons, one whereof was, that the trial lasted about sixteen hours, and abundance of evidence was given on both sides, yet the Jury were agreed on their verdict in half an hour's time; yet the Court would not grant a new trial: and the case of *Gay* and *Cross*, heretofore, was remembered; for the Court *declared*, that after a trial at bar they would not *easily* grant a new trial, more especially in ejectment, where the first verdict is not peremptory; and where there is no foul practice made appear in the Jury, or party for whom the verdict was, as keeping back of witnesses, &c. in which cases alone it was discretionary in the Court to grant it. And here they begged leave to amend their *affidavit*, which was opposed for this reason; that now they had learnt of the Court what would do their business, it would be dangerous to let them in to swear it: to which *Holt* said, that it was frequent in *Chancery*, after a witness had sworn before a master, to examine him again *viva voce* in Court. But Serjeant *Powis* replied, that it was no frequent thing so to do; for in all his time, he had known it done but twice. And *Powell* declared his dislike of mending *affidavits* where the party knew

V. ante.

knew before what was neceſſary, and had not ſworn it.

In 2 *Salk.* 650. *S. C.* it was ſaid as to iſſues out of Chancery, they being only to ſatisfy the conſcience of the chancellor, are not *ſtricti juris*; and that in the principal caſe a new trial was denied, *contra opinionem (ut videbatur) capital. juſticiar'. Sed. qu.?*

A witneſs examined at a former trial of an iſſue between the ſame parties, and who has been examined in the cauſe, in caſe he dies, not only his depoſitions may be read, but what he ſwore at the former trial may be given in evidence.

On the hearing of this cauſe, the *Lord Chancellor* directed an iſſue to be tried at the then next aſſizes at *Dorcheſter*, whether by the general words of the deed in queſtion, the lands in queſtion were intended to paſs; whereupon at the trial, and which was by a ſpecial jury, a verdict paſſed for the plaintiff; but upon a motion for a new trial, it being ſent by the *Lord Chancellor* to the Judge to certify, whether this was proper to be tried again, Mr. Juſtice *Price* did certify, "That evidence was "given on both ſides, and that he ſhould "have thought this caſe proper to be tried "again, but that one of the witneſſes ex- "amined for the plaintiff was ſince dead, by "means whereof the plaintiff might ſuffer on "ſuch new trial, and that therefore he rather "inclined againſt any new trial."

Coker v. Farewell, Hil. 1729. 2 P. Wms. 563. Lord Chancellor King, Maſter of the Rolls, 2 Eq. Caſ. Abr. 72[illegible]. Pl. 5.

Evidence on both ſides. Two trials.

After which certificate, there was another motion for a new trial; and the *Maſter of the Rolls* being preſent in Court, and his lordſhip deſiring

desiring his thoughts on this matter, his Honour said, the only objection to the new trial, appeared to be the death of the witness, and though it had been said, that the weight of a living witness would be greater than depositions, yet it was his opinion, that since this witness had been examined in the cause, and was dead, the depositions might be read; also, as the testimony which the witness had given at the former trial, might be given again in evidence against the same parties, he should rather think, that the other side had suffered by the death of the witness, since they had thereby lost the advantage of cross-examining. And the Court ordered a new trial to be had at the bar of the Common Pleas, where, after much evidence on both sides, the Jury found a verdict for the defendant, which was contrary to the former verdict.

And now a trial was again moved for; upon which it being sent back to the Judges of C. B. to know whether this cause was proper to be tried again, the *Chief Justice* acquainted the *Lord Chanceller*, that there had been very strong evidence given on each side, insomuch that he could not have blamed the verdict, on which side soever it had been given, and that he could not say this verdict was against evidence.

Afterwards another application was made for a new trial, when it was insisted, that this matter relating to an inheritance, it would be very hard to have the right determined by one trial, though at bar, and divers cases were cited where new trials were granted after a trial at (a) bar; and this ought the rather to be done in the present case, where there had been

(a) See the case of Leighton v.

been verdiƈt againſt verdiƈt, and conſequently the matter ſeemed to be left at large.

Sir Ed. Leighton, ante Eſſay II. IX. (o.)

But the *Chancellor* and the *Maſter of the Rolls* denied a new trial; ſaying, otherwiſe there would be no end of ſuits; that a trial at bar, where more time might be allowed, and the party was put to more expence, was of greater weight than one by *niſi prius*; that the intent of the Court in ſending the cauſe to be tried at bar was, that it might be final; but this caſe was the ſtronger, as the iſſue to be tried related only to the intention of the party, and not to any legal title, which queſtion might have been determined at the hearing, without ever ſending it to a trial; and here being a trial at bar, this might juſtly claim a preference to a trial by *niſi prius*, and was ſufficient to ſatisfy the conſcience of the Court; but that ſtill, if the party, againſt whom the decree was, thought he had a legal title, the Court did not debar him of that.

The Court lays more weight on a trial at bar than at niſi prius, *from the ſolemnity of it, and the length of the examination.*

LORD CHANCELLOR.—Where there are two trials, and the laſt was at the bar, this Court has ſuffered the laſt to prevail; and to lay down a rule that there muſt be three, will be attended with great expence: what turns in favour of the laſt trial, is the ſolemnity and length of examination, and the reaſon for directing a trial at bar is in order to that.

The Attorney General, at the relation of Clarke and others, verſus Montgomery, July 28th 1742. 2 Atk. 378.

The laſt verdiƈt here was on further evidence, which makes this a ſtronger caſe than the common one, where there are two trials

on the same evidence, and therefore I shall not grant a new trial on that ground.

An original motion must be made for a new trial, and the Court will not answer a petition for it, where the cause comes on upon the equity reserved.

I do declare, that for the future, I will not answer a petition for a new trial, where the case comes on upon the equity reserved, for I do expect an original motion to be made for that purpose, otherwise it is tending to great delay.

There were several proceedings in favour of the will, which make it reasonable to hear what the Judges say to the verdict.

Let it stand over to the first day of rehearing in the next term, for that purpose.

Trial at bar granted, upon consideration of the consequences of a conviction upon an information.

Rex v. Foley and Harley, E. 3 Geo. 3. R. 1 Stra. 51.

Information for taking *3s. 4d.* for registring a warrant of attorney, contrary to the lottery act, which says it shall be entered without fee or reward, and all persons offending shall be incapable to hold any place.

The defendants moved that they might have a trial at bar, for though the question seemed very short, whether they took the fee or not; yet the consequence was very considerable: the defendants are auditors for life, and that is a freehold of which they will be divested by a conviction upon this information. *Pasch.* 9 *Annæ Regina v. Harcourt, scire facias* to repeal letters patent, and there a trial at bar was had. *Sid.* 420. The Crown, it is true, may sue any where, but when the suit is commenced, it is in the power of the Court.

On the other side it was insisted, that the Court could not take notice of what would be

the consequences of a conviction; that the question was short, and the *onus probandi* upon the Crown, who might try the cause where it pleased.

Powys, *Eyre*, and *Pratt*, were for a trial at bar; but the Chief Justice said, the defendants ought not to pray a trial at bar in an issuable term. A trial at bar was granted for next term. *Vide post Rex v. Johnson.*

Trial at bar granted, on the ground of value.

In *ejectment* on the demise of Lord *Coningsby*, the plaintiff moved on the common affidavit of value, for a trial at bar, which was opposed by the defendants on another affidavit, that they severally held but small parcels of lands by different titles: and this is putting it in the power of the plaintiff, by joining several together, to bring the owner of but £. 5. *per ann.* to the bar. *Sed per Curiam*, there must be a trial at bar, for if the plaintiff makes but one title to the whole, he has a right to join them all together. It was moved that the lessor, having privilege, might name a good plaintiff to be liable to costs; but the Court denied it with some resentment, saying it had been often attempted, and as often refused.

Preston v. Lingen, M. 8 Geo. B. R. 1 Stra. 479. Trial at bar where grantable.

A new trial granted, after a trial at bar.

A corporation were all invited to a treat, when one of the aldermen desired leave to resign, upon which his resignation was taken, and the plaintiff at the same time chosen and sworn in.

Sir Christopher Musgrave v. Nevinson, E. 10 Geo. B. R. 1 Stra. 584. L. Raym. 1358. The resignation of an al-

dei man, and election of another in his place, at a meeting not convened for corporation business, adjudged fraudulent and void.

Upon a trial at bar the Jury found it a good election; and the Court granted a new trial, it being fraudulent, and it appearing one of the members was not there 'till after the election, and there was no summons to meet to do such a corporate act, that the members might come prepared. The meeting likewise was not in the *Moothall*, but at a tavern, and it was a plain surprize, and even all not present.

As to the point of its being a trial at bar, the Court made no difficulty of that, since the case of *Bewdley*, and another of Sir *Joseph Tyley* v. *Roberts*, *in C. B.* where on a trial at bar whether *compos* or *non compos* the Jury found against the weight of the evidence, and there was a new trial. The case in *Stiles* (which is the first new trial *in print*) was after a trial at bar; and in the case of an alderman of *Derby* he was afterwards ousted upon a *quo warranto*.

Et per RAYMOND, *Justice*.—My Lord Chief Justice *Holt* used to say, he was of opinion that the practice of granting new trials was much ancienter than the case in *Stiles*; since we meet with challenges that the party was sworn on the former trial, and therefore ought not to be a juror again.

A corporator on a recent prosecution must prove receiving the sacrament within a year.

N. B.—As to another of the corporators of *Apulby*, he was put to prove the receiving the sacrament within a year before his election, it being recent, and therefore the Court required it, though no notice was given him for that purpose.

N. B.—By *stat.* 5 *Geo.* 1. *c.* 6. *s.* 3. no person chosen into any corporate office mentioned in the *stat.* shall be removed or prosecuted, nor any incapacity, disability, forfeiture,

or

or penalty be incurred, by omission to take the sacrament, unless removed, or prosecution commenced within six months after being placed or elected into office, and the prosecution be carried on without wilful delay. Vide 2 Burr. 1016.

Trial at bar granted in an information against a Justice of peace for a misdemeanor in his office.

An information was exhibited by order of B. R. against the defendant for neglects and abuses in his office of justice of the peace, in relation to deer-stealers; and it was moved on behalf of the Crown, on affidavit of the defendant's having £.700. *per annum*, and there being above thirty witnesses for the prosecutor, that it might be tried at the bar: and the case of *Regina* v. *Wakefield*, the town-clerk of *Litchfield*, who fixed up a paper reflecting upon a jury, which was tried at the bar, was mentioned; and also the case of auditor *Harley*, where the matter in dispute was a trifle, but like to be of long examination; upon which authorities the Court granted a trial at bar in this case. Mr. Attorney said, had it been an information exhibited by him, he would have had a right to bring it to the bar if he had thought fit. N. B. The defendant was convicted and fined £.400. and committed 'till paid.

Rex v. Johnson, M. 12 Geo. B R. 1 Stra. 644.

Vide ante Rex v. Foley and Harley.

V. Id.

Motion, before issue joined, for trial at bar refused.

Case of the borough of Christ Church, E. 12 Geo. B. R. 1 Stra. 696.

Upon a motion for a trial at bar, which was consented to on both sides, it appeared issue was not joined: and the Court refused to grant it, saying it was below the dignity of the Court to do it, 'till they knew whether the issue joined would be a matter of difficulty or not.

Sed. qu. vide ante.

In what cases of the Crown a trial at bar is demandable.

Rex vers. Robertum Hales, M. 2 G. 2. B. R. 2 Stra. 816.

Mr. Attorney moved for a trial at bar, on an information filed by him for forgery. But it not being carried on at the expence of the Crown, but of a private prosecutor, the Court held that he must make out the usual requisites to bring it to the bar. So the motion was denied. At another day, Mr. Attorney moved on an authority from the king to prosecute, and it was granted as of right to the king in his own cause. In *Hil. sequen'* it was tried, and the defendant convicted. And in *Trin. sequen'* being called to judgment, he produced a pardon, which was allowed; and being only for a misdemeanor, he was not put to go to the bar, or plead it upon his knees.

Where the venire is laid in London, there cannot be a trial at bar, the citizens not being to be brought out of the city. Vide ante.

In an appeal of Murder *Castell, vid. v. Bambridge et Corbet*, (2 *Stra.* 855.) it was moved to fix a time for the trial, the appellees offering to take short notice; but it being by original, there was a necessity to have fifteen days between the *teste* and the return of the *distringas*,

distringas, and they could not be tried on the *venire*, because being in *London*, there could be no trial at bar, (the citizens not being to be brought out of the city) and as it must be tried at *nisi prius*, there must be a *distringas*.

Trial at bar in an action for crim. con. upon application of defendant, he having many witnesses to examine, &c.

This was an action for criminal conversation with plaintiff's wife; and the damages were laid for £. 50,000. defendant moved for a trial at bar, upon an affidavit that he had upwards of twenty witnesses to be examined. Rule granted to shew cause, which was afterwards made absolute, plaintiff having liberty to examine a witness in an ill state of health, before a judge in the mean time, and defendant consenting to waive his privilege of parliament. Ld. Hillsborough v. Jefferyes, Esq. T. 7 & 8 G. 2. Barnes, 438.

Darnal for defendant; *Chapple* for plaintiff. *Vide post.*

Reasons for granting, or refusing trials at bar, especially where there are old infirm witnesses who cannot travel to Westminster, *and the cause may be sooner tried at the assizes.*

A rule to shew cause why the trial should not be at bar, was founded upon an affidavit that the premisses in question were of the yearly value of £. 100. and upwards; and that a strict and careful examination of the title would be requisite. At the time of shewing cause it was also alledged on plaintiff's behalf, Frost against Whadcock, alias Avery and others, on the demise of Avery, in ejectment, E. 14 Geo. 2. Barnes, 447.

 that

that he had a great number of witnesses to examine: and that the point to be tried was *compos vel non* in *William Avery*, at the time of making his will, under which the defendant *Whadcock* claims his right. On behalf of defendant it appeared, that they had some ancient and infirm witnesses to examine, who could not travel to *Westminster*.

Per Cur': We are not, according to the course of the Court, bound down by the value of the premisses in question, which is sworn to be £. 100. *per ann.* As to strict examination, it is necessary in all cases, and is nothing with respect to a trial at bar. When a long cause is to be tried, a judge, upon notice, will take a day extraordinary at the assizes, where an examination of a great number of witnesses is most proper and least expensive. There is no nicety in this point, or difficulty, so as to require the attention of the whole Court. Ancient witnesses grow weaker every day, and often are not able to travel to *Westminster*. Let the rule be discharged. Plaintiff prayed leave to examine an old witness before a judge, upon interrogatories. But *per Cur'*, that cannot be done without consent. A cross examination cannot be supplied by depositions. If a trial at bar was ordered, it could not be 'till next *Michaelmas* term; and before that time the assizes will be held. *Birch* for plaintiff; *Willes* for defendants.

Vide ante.

Motion, before appearance, for trial at bar, granted.

Roe against Doe, in ejectment, on the

Rule for tenants in possession to shew cause why the issue to be joined should not be tried at

at bar next term. Objected on the part of Lady *Wentworth* the landlady, Sir *Butler's* widow, That a trial at bar cannot be moved for by plaintiff 'till after appearance, and the time to appear will not expire 'till four days after this term. Two rules of the Court of King's Bench produced, one by consent, the other not by consent, except as to *nisi prius* costs, where trials at bar had been ordered before appearance. Rule absolute for trial at bar on 8th *May* next. If plaintiff's motion had not been received before appearance, no trial at bar could be appointed 'till next *Michaelmas* term. Lady *Wentworth's* counsel prayed the conditional rule, and to defend for part; which was granted, and six weeks time to describe the part defended for.

demise of Cholmondly and his wife, for a considerable estate in Yorkshire late Sir Butler Wentworth's, deceased, H. 18 Geo. 2. C. B. Barnes, 455.

Prime & al' for lessors of plaintiff; *Skinner & al'* for Lady *Wentworth.*

The grounds for granting a trial at bar are, great value, probable length, and probable difficulties in the trial.

The Court may lay the party applying under the terms of receiving nisi prius *costs, and paying* bar *costs.*

This was an application for a trial at bar. *Kenyon*, some time before, had obtained a rule to shew cause, and *Partridge* this day shewed for cause, (upon affidavits) that the lessor of the plaintiff was in such indigent circumstances, as not to be able to bear the expence, and that one of his witnesses was a woman of above eighty years of age, who might die before a trial at bar could be had. The value of the premisses was stated to be about £. 2000. a

Holmes, lessee of Brown, against Brown, T. 20 Geo. 3 B. R. Dougl. 420.

 year,

year; and the queſtion, whether a codicil to a will by which they were deviſed was duly executed. *Partridge* cited Lord *Sandwich*'s caſe in *Salkeld*, (a).

(a) V. ante.

Kenyon, in ſupport of the rule, ſaid, that the grounds on which a trial at bar ought to be granted, were, the great value of the ſubject matter of the litigation, the probable length of the inquiry, and the likelihood that difficulties might ariſe in the courſe of the trial (1). He then endeavoured to ſhew, that theſe reaſons co-operated in this caſe.

(1) The words of the ſtatute of Weſtminſter, 2 (13 Edw. 1 cap. 30.) are; "Sed inquiſitiones de groſſis & pluribus articulis, quæ magna indigent examinatione, capiantur coram Juſticiariis Banci."

Lord Mansfield abſent.

The Court were of opinion, that this was a caſe where it was fit that a trial at bar ſhould be granted; but ſaid, that, as it was a favour aſked by the defendant, they would lay him under the terms, that, if he ſucceeded, he ſhould only have *niſi prius* coſts; but, that if the leſſor of the plaintiff were to ſucceed, *he* ſhould have bar coſts, and that the old witneſs ſhould be examined upon interrogatories, and her depoſitions read, if ſhe ſhould die before the trial. It was alſo (by conſent) made part of the rule, that the cauſe ſhould be tried by a *Middleſex* jury, inſtead of one from *Norfolk*, where the premiſſes were ſituated.

The rule made abſolute.

Upon

Upon an application for a trial at bar, the Court will, in every case, exercise its own discretion, upon the peculiar circumstances thereof. Where a fair trial cannot be had in the county where the matter arises, the trial will be awarded in the next English *county* where the king's writ of *venire* runs.

A rule was made absolute, no cause being shewn, on a motion by *Erskine*, for leave to enter a suggestion on the record in this action, "that the corporation and citizens of *Chester* "were interested in the event of this suit, and "therefore, that a fair and impartial trial "could not be had in the county of the city "of *Chester*." Rex v. Amery, Trin. 26 G. 3. B. R. Durnford and East, 1 V. 363.

Erskine then moved for a trial at the bar of this Court; and relied upon the importance of the question to be agitated. Lord *Holt* says, that a trial at bar is of common right; and in cases of intricacy it is peculiarly requisite.

It will be sufficient therefore to induce the Court to grant it in this instance, by stating to them the magnitude of the subject in dispute, and the variety of issues which are to be tried.

The principal question is, whether the right of electing aldermen in the city of *Chester*, is vested in the citizens at large, or in a select body?

There are twelve issues on this record.

1st. That this is not a body corporate by prescription.

2d. *Non concessit*, by the charter of the 27 of Car. 2.

3d. That the charter of *Car.* 2. was not accepted, as to the election of aldermen.

4th. That certain persons appointed aldermen under that charter, did not act as such.

5th. That the mayor, aldermen, and common-council, have not used to elect under the charter.

6th, 7th, and 8th, Relate to the qualification and election of the defendant, to the office of alderman.

9th. That the charter of *Car.* 2. was accepted, as to all matters contained both in the plea, and replication.

10th. That the order of amoval in the time of *Jac.* 2. was not signified.

11th. That the charter of restoration of *Jac.* 2. was accepted.

12th. That the charters of *Hen.* 7. and *Elizabeth* are still in force.

These issues must necessarily give rise to many intricate questions of evidence, and in fact go to the very existence of the corporation. In the *Maidstone* cases (a), the Court granted a trial at bar upon similar grounds, because the question to be tried involved in it the constitution of the borough.

(a) Vide at the end of the principal case.

The Court granted a rule to shew cause.

Bearcroft, *Cowper*, *Bower*, *Leycester*, and *Manley* shewed cause, and contended, 1st, That the number of issues on a *quo warranto* information, was not of itself a sufficient reason to induce the Court to grant a trial at bar; for the same reason would equally extend to every *quo warranto* information; neither is there any peculiar difficulty arising from these issues to warrant the application; for the principal question is upon the acceptance of

 the

the charter of the 27 *Car.* 2. which muſt be proved by the records of the corporation.

But if the Court grant a trial at bar, they cannot ſummon a jury from the county palatine (b); there never having been an inſtance of that kind hitherto, except in caſes of treaſon and error. Then 2dly, if the Court ſhould not grant a trial at bar, the next queſtion is, in which county this information ſhall be tried.

(b) 4 Inſt. 212.

It is not a matter of right to have a record ſent into a county palatine, as being the next adjoining county; and if it be only a matter of diſcretion in the Court, they will not think it adviſeable to ſend this queſtion to be tried in the county palatine of *Cheſter*, as the aſſizes are held in the heart of the city, where the parties concerned have extenſive connexions, who are intereſted in the event of the trial.

It appears from all the caſes (a) upon the ſubject, that it is not a matter of right to ſend a record down by *mittimus* to be tried in a county palatine, unleſs the matter ariſes within that county. All the caſes upon this ſubject are collected in the caſe of the *King* and *Cowle* (b), which aroſe in the town of *Berwick*; there, though *Durham* was in fact the next adjoining county, yet the court upon full conſideration ſent the iſſue to be tried in *Northumberland*. Wherever it is ſuggeſted that a record ſhould be ſent down to be tried in the next adjoining county, it means the next county into which the king's writ runs. So, where the matter aroſe in *Ireland*, the *venire* was directed to the ſheriff of *Salop* (c), though the *Welſh* counties, and the county palatine of *Cheſter* are both nearer. Again, the whole of *Flintſhire* joins to the county palatine of *Cheſter*, and no part of it to

(a) 19 H. 6. fo. 12. b. pl. 31. 2 Rol. Abr. tit. Trial L 1. pl. 6, 7, 8. Bro. Abr. tit. Trial pl. 27. 4 Inſt. 205.

(b) 2 Burr. 834.

(c) 2 Rol. Abr. tit. Trial, I. pl. 8.

Salop, and yet there is no instance of a record in any action arising in *Flintshire* having been sent to *Chester*. Wherever there has been an exception to this general rule, it has always been by consent, as in the case of the *King* and *Johnson* (d).

(d) Hil. 7 Geo

Wilson, *Erskine*, *Wood*, and *Topping*, admitted, as to the first question, that whether there shall be a trial at bar or not, depended upon the discretion of the Court; but that discretion ought to be regulated by law, and founded on precedent; and the *stat of Westm.* 2. authorises the party to claim a trial at bar, in every question of importance. A *quo warranto* information, on which depends the existence of a corporation, is of greater consequence than a mere question of right between two individuals. One of the issues to be tried is, whether the charter of *Car.* 2. was accepted as to the election of aldermen, and upon that a considerable question of law will arise, whether a charter can be *partially accepted*. Another issue is *non concessit*, which involves a question, whether the king can grant otherwise than under the seal of the county palatine; and whether the grant was made to persons capable of taking it.

(a) V. ante.

In Lord *Sandwich*'s case (a) the Court said, that where there was value and difficulty, they were bound of common right to grant trials at bar.

As to the doubts which have been thrown out respecting the jurisdiction of the court, and their power to summon a jury to their bar from a county palatine, there can be no foundation for them; for wherever the court can send down a record to be tried, they must likewise have a power of summoning a jury

from

from the same place to attend them at their bar. Now here the court might certainly send down this record to the Chief Justice by *mittimus*; and if the jury should be summoned to attend at the bar of this Court, and they refused to attend upon the ground of an exclusive jurisdiction, the Court might proceed against them for a contempt. In the case of the *King* and *Godfrey* (b), the sheriff of the city of *Canterbury* was fined £. 100. for returning to a *distringas*, that the mayor and commonalty of the city were exempted from serving on juries; in consequence of which a jury was afterwards returned. The cause of *Lockyer* against the *East India Company* (c) was tried at bar by a special jury of merchants from the city of *London*, notwithstanding there had been a different decision upon the same point in *E.* 5 *W.* and *M.* (d) by reason, as it was said of their charter. So also in the case of the *King* and *Lambe* (e), an application was made to the court for a new trial, because the warrant for a *tales de circumstantibus* was only signed by his Majesty's Attorney-General, whereas it ought to have been procured from the Attorney-General of the county palatine; but that was held to be no good ground. The case of the *King* and *Johnson* (f), which was sent down to be tried by *mittimus* in the county palatine of *Chester*, and where a similar question arose upon the acceptance of a charter of 16 *Car.* 2. does not appear upon the face of it to have been sent down by consent.

(b) Hard. 389.

(c) M. 2 G. 3.

(d) 2 Salk. 644. V. ante.

(e) 4 Burr. 271.

(f) Hil. 7 G. 2.

As to the second point: whenever the matter cannot be tried in the place where the

cause

cause arises, it must necessarily be tried in the next adjoining county; the *King* against *Harris* (g). This rule is supported by a variety of precedents. One in particular is more immediately applicable. In the case of the *Mercer's* and *Ironmonger's* Company of *Chester* against *Radford* (a), the exchequer court of equity of *Chester*, granted a trial in the county palatine, because an impartial trial could not be had in the county of the city.

(g) 3 Burr. 1330.

(a) 2 Lev. 33.

Such has always been the invariable rule, unless both parties have consented to a trial in another place: and even in those cases, where the matter has arisen in a distant county, and there has been a trial at bar by a jury of the county of *Middlesex*, the form of the suggestion has always been, that the jury were summoned from the next adjoining county. And in the present case, the county palatine is the next adjoining county, where the record may be sent by *mittimus*.

Lord MANSFIELD, *Ch. J.*—All questions concerning trials at bar must depend upon their own circumstances. Many informations in the nature of a *quo warranto*, upon which the existence of corporations depended, have been tried at *nisi prius*, and many at bar. The only rule therefore to go by is, the judgment which the court shall form on the nature of the issues and their dependencies. Now, it seems to me as clear as possible, that no question of magnitude can arise in this case to render a trial at the bar of this Court necessary. Many of the issues will admit of no litigation, such as, that it is a corporation by prescription; and the granting, in fact, of the charter by *Car.* 2,

and

and ſome others, are only conſequential. The great queſtion is on the *acceptance* of the charter of *Car.* 2. but that cannot involve in it much difficulty. We know the obloquy which charters granted at that time lay under. As my Lord *Hardwicke* ſaid (b), they have never received any countenance in *Weſtminſter Hall*; and he never would give any opinion in ſupport of them, unleſs the ſtrongeſt evidence was laid before the court of their having been accepted and uniformly acted under. Therefore there is no ground in this caſe for a trial at bar.

(b) In. R. v. Johnſon.

Then the next conſideration is, where it ſhall be tried. Now, with regard to that, all local queſtions which ariſe in a county palatine, muſt be tried there (c). In the preſent caſe, the matter ariſes locally in the county *of the city* of *Cheſter*: but, by the ſuggeſtion which has been entered upon the record, it appears, that an impartial trial cannot be had there, therefore it muſt be tried in the next county; but that muſt mean the next county where the king's writ of *venire* runs. The county palatine of *Cheſter* cannot be called the next county for this purpoſe, becauſe the king's writ of *venire* does not run there. All this I take to have been fully, finally, and in point eſtabliſhed in the *Berwick* caſe. And though *Northumberland* was not there ſaid expreſsly to be *the next county where the king*'s *writ runs*, yet it was taken for granted that it was ſo.

(c) 4 Inſt. 212.

For the ſame reaſon, where a matter ariſing in *Wales* is tried in the next county, it is never tried in the county palatine of *Cheſter*, but always in the next *Engliſh* county where the king's writ runs.

BULLER,

Buller, *J.*—It is observable, that there is no instance, except that of the *King* and *Johnson*, where the court has ever sent a record by *mittimus* to be tried in a county palatine, where the fact did not arise there; and I very much doubt the power of the court to do it. It is not quite clear when the doctrine of sending records by *mittimus* into counties palatine was first taken up; but in the 11 *Will.* 3. (a), the Court expressly said, that they could not order a trial in the county palatine of *Lancaster*, and therefore they sent the record to be tried in *Yorkshire*, as being the next county.

(a) Vid. 12 Mod. 313.

Then as to the meaning of the expression of the next *English* county, it is sufficiently explained in *Plowd.* 200. where the reason given for directing the *venire* to the sheriff of *Hereford* was, because the town of *Cardiff* was in the county of *Glamorgan* in *Wales*, *where a sheriff of this kingdom of England cannot intermeddle.* From this reason it is manifest, that it must be the next *English* county where the king's writ of *venire* runs. That is the only way of accounting for the *Welsh* causes having always been tried in the next *English* county where the *venire* runs, and not in *Chester*, though in fact that is nearer to *Wales*.

Rule discharged.

And the *venire* awarded into the county of *Salop.*'

(a) The *Maidstone* cases came before the Court in *Hil.* 13 *G.* 2. under the names of

Rex v. *Weldish.*

Rex v. *Rand.*

Rex v. *Curteis.*

These were informations in the nature of *quo warrantos* against the defendants, to shew

cause

cause by what title they exercised the office of Jurats of the *King's Town*, and parish of *Maidstone* in *Kent*: and the question was, whether there ought to be trials at bar?

It was objected against the trials at bar, by Mr. *Solicitor-General*, that there was no reason for it, either upon account of the length or difficulty of the trials, because there was but one single issue that was material, and that was upon a bye-law, which was a fact, the proof of which could not take up any great length of time. As to the other issues upon the election, swearing and admission, they were only consequential, and must attend the fate of the issue upon the bye-law.

E. contra, it was insisted, that the bye-law was pleaded as a bye-law, not extant in writing, which must depend upon usage, which usage must be proved by entries out of the books of the corporation.

That there was also another bye-law set out in the prosecutor's replication, though no issue was taken upon it, which would have very great weight upon the trial: and the proof of that would likewise depend upon a great variety of entries, in order to shew that it was under that bye-law and not under the bye-law alledged in the defendant's plea, that the common-council had exercised a power of electing jurats.

That the constitution of the corporation depended upon these trials, and that several points of law might arise in the course of them.

That,

That, in *Easter* term last, the defendants themselves consented to trials at bar, which the court would then have granted, but that the issues were not then joined. That the prosecutor had made an affidavit of all these facts.

Per Cur. let there be trials at bar.

ESSAY V.

Of Repleaders.

Whether upon an improper or immaterial issue, a repleader shall be granted, or not.

DEBT against lessee for years for rent. The defendant pleaded that *he* before the rent was due, for which the action was brought, had assigned the term to another, of which the plaintiff had *notice*: the plaintiff took issue upon the *notice*, and the verdict being for the defendant, it was moved by *Allen* for the plaintiff, that no judgment ought to be given, but a *repleader* awarded, because the issue was of an immaterial thing, for it is not the notice of an assignment of the term, without the agreement of the lessor, or acceptance of rent by him from the assignee, which discharges the lessee, but an agreement to this, or acceptance of rent from the assignee doth. And he cited *Nicholl*'s case, 5 *Co.* Issue taken of *payment* upon a single bill (without acquittance) being found for the plaintiff, he shall have judgment: but if it had been found that defendant had paid, judgment should be arrested. And the difference he said is when the issue is found against the pleader, judgment shall be for the plaintiff; but if for him not. *Twisden*, J.—said, if an *improper* issue is taken and verdict given, judgment shall be given upon

Serjeant v. Fairfax, E. 13 Car. 2. B. R. 1 Lev. 32.

To an action of debt for rent, defendant pleads assignment of the term before rent due, of which plaintiff had notice, who takes issue upon the notice.

V. post Jones v. Bodiner.

upon it whether it be for the plaintiff or defendant, and cited 5 *Cro.* 575. But an *immaterial* iſſue is, where upon the verdict, the Court do not know for whom to give judgment, whether for the plaintiff, or for the defendant, as *Hob.* 175. And the *Chief Juſtice* and *Windham* agreed with him, and awarded a *repleader*, 2 *Cro.* 585. 3 *Cro.* 227, 228. and 2 *Cro.* 5.

Day *and* place *made part of the iſſue.*

Holbech v Bennett, T. 23. Car. 2. B. R. 2 Lev. 11. M. ult. 670.

Plea in bar to an avowry for rent in arrear, that H. did not demiſe on the ſaid 1ſt October at F. iſſue thereon and verdict for plaintiff.

Error of a judgment in replevin in C. B. where *Bennett* was plaintiff in the replevin for taking his cattle in *Fillingly Field* in *Fillingly*; and *Holbech* avowed for that the mayor, and commonalty, and divers other particular perſons by name, were ſeiſed and by their indenture dated 11 *March* 1647, it was witneſſed, that they demiſed to *Bennett* for twenty-one years, and by indenture 1ſt *May* in the 11th year of the new king, it was witneſſed, that he aſſigned to *Holbech*, and that 1ſt *October* in the 11th year of the new king, *Holbech*, at *Fillingly*, demiſed to *Bennett*, rendring rent; and for rent in arrear he avowed; the plaintiff *Bennett* in bar ſaid, that *Holbech* did not demiſe the ſaid 1ſt *October*, at *Fillingly* aforeſaid, in manner and form as, &c. Upon which iſſue, and verdict for the plaintiff, that he did not demiſe, the ſaid 1ſt *October*, at *Fillingly*, in manner and form as, &c. and upon this judgment for the plaintiff, and now error aſſigned that this was an immaterial iſſue, making the *day* and *place* of the demiſe part of the iſſue, for a demiſe at any other day, or place, had been ſufficient to maintain the

avowry, and they are only put for conformity in pleading, but the plea ought to have been general, that he did not demise, in manner and form as, &c. and the *day* and *place* ought to have been omitted out of the traverse, for they are not traversable, and if it had not been a fact, the avowant might have given in evidence a demise at another *day* and *place*, which had been sufficient for him to maintain his avowry for rent, of which he is now deprived, by the bad bar of the plaintiff, and the Court knows not for whom to give judgment, according to the right of the matter, and because this case is not remedied by the new statute, which cures defaults, where the right of the matter is tried; as was objected for the plaintiff that it is; and of such opinion was the Court, after the matter had been twice debated; but then it was doubted by the Court what should be done: for *per Hale*, Chief Justice, the Court cannot now award a repleader upon a writ of error, if they reverse the judgment, as was anciently done, for which he cited *Trin.* 8 *E.* 2. *Rot.* 59. *Trin.* 11 *E.* 3. *Rot.* 75. *Trin.* 27 *E.* 3. *Rot.* 21. *Hil.* 33. *E.* 3. *Rot.* 79. where this Court awarded a repleader upon a writ of error, after reversing of the judgment, as the court of C. B. ought to have done before judgment; for this he said had been disused above one hundred years, and it could not be put in practice now, upon which it was prayed on behalf of the avowant, to reverse the judgment, and leave the matter at large, but then *Hale*, Chief J. took two exceptions to the avowry; 1. It is said that the mayor and commonalty, and the feoffees, were seised, which is intended of a joint seisin, and a corporation and natural persons cannot be seised jointly.

If B. R. reverse a judgment for mispleading, they cannot award a repleader. Qu?

Plea of indenture by testatum existit not good.

jointly. 2. The assignments are not pleaded positively, but by a *testatum existit*, and then, if they reverse this judgment, perhaps they might give judgment for the plaintiff, upon his declaration, for the defect of the avowry. *Et adjournatur*; *Saunders* for the plaintiff, *Levin* for the avowant.

Outlawry and process of execution thereon, pleaded to an action of trespass; replication, the lands where, &c. traversed, and verdict for QUER'.

Quære, if he shall have judgment on the verdict, or on the declaration and plea; or a repleader?

Jones v. Bodiner, T. 8 W. 3. B. R. Comb. 379.

Trespass for breaking his close and taking his cattle: the defendant pleads, that the plaintiff was outlawed, and a *capias utlagatum* issued, and an extent thereupon, and then a writ of *Levari*. *Hil.* 7 *W.* & *M.* reciting the outlawry, and commanding to levy from the day of the taking upon the extent; that this writ was delivered to the sheriff, who made a warrant, by virtue whereof the defendant took the cattle in those lands.

The plaintiff replies, that the defendant took them upon other lands of the plaintiff *absq' hoc*, that he took them upon those lands; whereupon issue was joined, and verdict *pro quer'*.

It was now debated by Sir *Barth. Shower pro quer'*, and *Northy pro defendente*, whether the plaintiff should have judgment upon the verdict or upon the declaration, and the defendant's confession of the trespass by his plea, or that there should be a repleader; for it was

 agreed

agreed on all hands, that the bar was ill, for there could be no ſuch writ, *Hil.* 7 *W.* & *M.* (for the queen was then dead) and the iſſue ſeemed immaterial.

Sir *Barth. Shower pro quer'*, that where the plea contains matter of bar, though not a good bar, and iſſue is taken upon it is holpen by the verdict. 3 *Cro.* 228. *Lovelace* and *Grimſden*, 3 *Cro* 455. *Chamberlain* and *Nichols*. *Mo.* 692. *S. C.* where in debt upon a ſingle bill, the defendant pleaded payment without an acquittance, yet iſſue being taken and found for the plaintiff, he had judgment. 3 *Cro.* 778. *Dighton* v. *Bartholomew*, in treſpaſs and aſſault the defendant pleaded a concord, but without ſatisfaction; and after iſſue and verdict *pro quer'*, it was adjudged that it was helped by the ſtatute. *Mo.* 867. *Taſker* and *Salter*. *Hob.* 326. *Reynolds* verſus *Buckle*. *Raymond* 458. *Spathurſt* verſus *Overind*.

The iſſue being immaterial, judgment was on the defendant's confeſſion, and the verdict ſet aſide. Vide ante Serjeant v. Fairfax.

Northy agreed, the rule laid down by Sir *Barth. Shower*; but here is no matter of bar at all, becauſe there could be no ſuch writ.

Holt, C. J.—There might be a writ out of the exchequer; and if it had been well pleaded, it had been a good bar, ſure it hath the countenance of a plea in bar. 2 *Cro.* 678. *Jones* verſus *Ridler*, in ejectment, where the defendant pleaded an ill ſpecial plea (for ſometimes they pleaded ſpecially in thoſe days) it was held he could not take any advantage of his own ill plea, but the plaintiff might if the verdict had been againſt him.

I take the caſe of *Reynolds*, *Hob.* 326. to be miſprinted, for the entry is no bar. Expulſion makes the firſt part of the bar, and holding out the reſt, the book ſaith it was found for the defendant, which could not be, the judge

Hob. 326. denied.

muſt direct the jury otherwiſe. 3 *Cro.* 367. *Stokes* verſus *Anneſby*. In the caſe of *Taſker* and *Salter* the judgment was reverſed.

And the Court inclined to give judgment for the plaintiff upon the verdict, but afterwards *Holt* cited 3 *Cro.* 214. *Lacy* verſus *Reynolds*, and 2 *Roll.* 99. *S. C.* and the Court agreed, that the plaintiff ſhould have judgment in this caſe upon the defendant's confeſſion of the treſpaſs, the iſſue being immaterial, ſo that the Jury could not give damages, but there muſt be a new writ of enquiry. *Per Holt*, 1 *Cro.* 25. *Knight* verſus *Harvey* (though not clearly reported) is home to the purpoſe, only in that caſe being in debt, there needed no writ of inquiry. 22 *E.* 4. 46. *a.* (though before the ſtat. of jeofails) yet goes to the reaſon of the thing.

The verdict was ſet aſide and judgment *pro quer'*.

Of an impertinent iſſue; of repleaders in general; of jeofails, defaults, and eſſoins, &c.

Staple v. Haydon, M. 2 Ann. B. R. 6 Mod. 1. The caſe. Treſpaſs, juſtification as to one treſpaſs for a way. Replication, defendant had a more convenient way, and iſſue.

The plaintiff *S.* brings treſpaſs againſt *J. H.* and *G. Fowler*, for that they, on the 31ſt of *May*, in the thirteenth year of the late King *William*, broke his cloſe called the *Wharf*, in *Stepney* in *Middleſex*, and threw down a perch of rails therein ſtanding: and alſo, for that on the 7th of *July* following, they entered into the ſame wharf, and committed the like treſpaſs.

Hob. 66.

The defendant *G. F.* as to all, pleads Not guilty: but *J. H.* as to the treſpaſs laid on the 31ſt of *May*, pleads Not guilty as to the force, and juſtifies the entry, and throwing down the

rails;

rails; for that long before one *Edward G.* was poſſeſſed by virtue of a certain leaſe for eighty years then to come, and yet unexpired of the ſaid wharf, and alſo of a yard next adjoining thereunto; and that for the neceſſary uſe of the ſaid yard, he had and uſed a way over the ſaid wharf to certain ſtairs on the river *Thames*, which was thereunto contiguous, there to take water, &c. and being ſo poſſeſſed, he, on ſuch a day and year, which was prior to the time laid in the treſpaſs, demiſed the ſaid yard (*inter alia*) to the defendant *J. H.* for a term of years yet unexpired, with all lawful ways, &c. thereunto belonging: by virtue whereof he entered, and was poſſeſſed, &c. whereby he was intitled to the ſaid way: that the plaintiff obſtructed it with rails, ſo he coming to uſe it could not paſs; and that he requeſted the plaintiff to open the rails, which he refuſed, ſo he juſtifies the throwing them down, and pleads directly in the ſame manner to the other treſpaſs laid on the 7th of *July*, and avers, that at the ſeveral times he had no other way to the ſaid ſtairs and river *Thames*, than by and through the ſaid wharf.

Plea to the other treſpaſs that he had no other way to, &c. demurrer and joinder.

Plaintiff, as to the plea to the firſt treſpaſs, replies, that the defendant *J. H.* had another more convenient way to the river *Thames* than through the ſaid wharf, and thereupon they are at iſſue; and upon the plea to the treſpaſs on the 7th of *July*, he demurs, *ideo fiat jurat*, to try the iſſues, and aſſeſs contingent damages upon the demurrer. Both defendants make default at *niſi prius*; which being recorded, the inqueſt is awarded by default, and *G. Fowler* is found guilty of the treſpaſs on the 31ſt of *May*, but acquitted of that on the 7th of *July*; and *J. H.* is acquitted of the treſpaſs

Hob. 66.

on the 31ſt of *May* as to the force, but the Jury found as to the reſt, that he had no other way to the ſaid ſtairs and river *Thames* than through the ſaid wharf, and aſſeſs damages upon the demurrer, and acquit him of the treſpaſs on the 7th of *July*.

In this caſe ſeveral points were moved and reſolved by the Court:

(1.) If a repleader ought to be in this caſe.

R. Whether a repleader ſhould be in this caſe, there being, as was ſaid, an immaterial iſſue joined; and the Court held clearly the iſſue was *impertinent*, but as to repleaders generally.

When a repleader ſhall be upon an immaterial iſſue.

1. The Court held, That a repleader is to be awarded when ſuch an iſſue is joined, as the Court after trial thereof cannot give a judgment, as being impertinent, and not determining the right.

2. That before the ſtatute of *jeofails*, if ſuch an iſſue were joined, the Court before trial might award a repleader.

Where the amendment muſt begin as to repleader.

3. When a repleader is awarded, the amendment muſt begin where the plea which makes the iſſue bad begins to be faulty; and therefore if one makes himſelf a bad title in his declaration, to which there is a bad bar, and thereupon a bad replication on which there is iſſue, there the repleader muſt be awarded and entered on record; and plaintiff ſhall declare *de novo*, &c. But if the bar be good, or plea be good, and the replication bad, and iſſue thereupon, there a repleader will be only as to replication; but if bar and replication be bad, and a repleader awarded, it muſt be as to both. *Vid.* 3 *Keb.* 664.

Error.

4. If the Court award a repleader where it ought not to have been, or deny it when it ought to be, it is error.

5. That

5. That upon award of repleader, there must be no costs, because it is a judgment of the Court upon the pleading; but upon amendment of a plea in paper, there must be costs. No costs on award of repleader.

6. That upon a general rule for repleader, without any direction from the Court from what they should begin the repleader, it must begin from the first fault which occasioned the bad pleading commenced, for the judgment is *quod partes replacitent*. General rule of repleader.

7. That the pleadings in this case were such as a repleader would be awarded upon at the common law; for the defendant having insisted upon a title to a way by grant, his averment, that he had no other way, was immaterial, and by consequence the issue thereupon impertinent; besides there was no issue at all joined, for the plaintiff's affirmative does not meet with the defendant's negative. Averment immaterial, and the issue impertinent.

8. That though a repleader should have been at common law in this case, this motion having been made before trial, and it being doubtful whether a verdict would not help it by the statute of *jeofails*, the Court said it would be just in them not to grant a repleader till after verdict; for they said they might indeed grant a repleader before verdict at common law, but they were not bound to do it. Repleader by common law, and when grantable. So note the diversity since the statute; for though it were reasonable to award a repleader before verdict at common law, where the pleading appeared such on which no judgment could be after verdict; yet since the statute, when verdict may cure immaterial or informal issues, it may not be proper to do it. Aid by statute law.

9. After the trial, the Court held, That this issue was such on which no judgment could Vid. 2 Lev. 135. Acc. 2 Saund. 318, 319.

 be;

be; for defendant pleaded, that he had no other way to the ſtairs and river *Thames*. Plaintiff replies, that he had another way to the ſaid ſtairs and river *Thames*; and Jury found no other way to the ſaid ſtairs and river *Thames*, ſo in truth there was no iſſue joined.

10. That in this caſe there could be no repleader, for the parties were quite out of Court by the default.

Points agreed as to a way claimed.

In reference to the way claimed, theſe points were agreed on by all:

1. That a man cannot claim a way over my ground from one part thereof to another; but from one part of his own ground to another, he may claim a way over my ground.

Vid. 2 Cr. 170.

2. A ſtranger may have a way over another's ſoil three manner of ways, *viz.* for *neceſſity*, by *grant*, and by *preſcription*: for *neceſſity*, as if *A.* has an acre of ground ſurrounded by ground of *B.* *A.* for neceſſity has a way over a convenient part of *B.*'s ground to his own ſoil, as a neceſſary incident to his ground: ſo if *A.* grant a piece of land which is ſurrounded by land of vendor, he grants a way as a neceſſary incident therewith.

Way for neceſſity.

By grant. Cr. 121, 122 17

3. If one be ſeiſed of *Black-acre* and *White-acre*, and uſes a way over *White-acre* from *Black-acre* to a mill, river, &c. and he grants *Black-acre* to *B.* with all ways, eaſements, &c. the grantee ſhall have the ſame conveniency that grantor had when he had *Black-acre*: ſo if *A.* has two acres of land, and has a way from them over another's ſoil, and grants one of them with all ways, the grantee ſhall have the ſame way that grantor had: but there the grantee in making title muſt alledge ſuch an eſtate in the grantor as is traverſable, and not only

only say, that the grantor was possessed of the place to which, &c. for a term of years, for there the possession would be traversable materially.

If a way of necessity be claimed, it is a good plea to say, the party has another way; but *secus* where a way is claimed by grant or prescription. Prescription.

4. The way of pleading in this case had been to shew, that such a one was seised in fee of the place to which, &c. and being so seised was intitled to a way, and shew how, and that he granted to lessor, &c. who also granted it to him, &c. For when one shews a particular estate, he must settle the fee in somebody. The way of pleading a particular estate.

5. It was agreed, that by grant of a house to which there is a way of necessity, without more, the grantee shall have the way as well as if it were specially mentioned in the grant. 2 *Cr.* 190. A way of necessity.

It was resolved, that if the plaintiff had demurred to the defendant's plea, without doubt he should have had judgment. (3) If demurrer to plea.

Upon the point, Whether the matter were now cured after verdict by the statute of *jeofails*, these points were agreed: (4) If aided here by the stat.

1. If a jury find a point in issue, and a superfluous matter over and above, that shall not vitiate the verdict.

2. That in this case the Jury found nothing that was put in issue, for they do not find that either he had no other way, or had another way to the *Thames*; but that he had no other way to the stairs and *Thames*, which might well be, and yet he might have another way to the *Thames*.

As to defaults after issue, the Court took a diversity between a real and a personal action; for (5) As to defaults after issue, &c. in real actions.

for in a real action, if a tenant make default, the demandant may, if he pleaſe, waive the benefit of it, and proceed by further proceſs againſt him; as if the tenant make default on the original, the demandant ſhall have a *grand cape*; and if the tenant do not ſave his default, the demandant, if he inſiſts upon it, ſhall have judgment final upon the firſt default; but he may, if he pleaſe, releaſe the default, and continue further proceſs againſt him. In like manner of a default after appearance, the demandant ſhall have a *petit cape*, &c. and if the tenant do not ſave his default, he may have judgment upon the default; or if he will waive that advantage, he may, and proceed by further proceſs. If in a real action the tenant make default at *niſi prius*, the default is never recorded, but only the *poſtea* marked; and the demandant, if he will, ſhall have a *petit cape*, and judgment thereupon if the default be not ſaved, or elſe he may waive the default, and continue with further proceſs. But in caſe of a perſonal action, a default at the trial is always recorded, and there is no farther proceſs in law to bring the defendant into Court upon releaſe of the default. And anciently at every continuance-day the parties were demandable; and if the defendant did not appear, or were not eſſoined, his default was recorded, and judgment given againſt him thereupon: but by the ſtatute of *Marlbridge*, c. 13. and *Weſtm.* 2. c. 27. after iſſue joined in a perſonal action, the defendant ſhall have but one eſſoin and one default; and if the default be upon the *venire fac'*, then it is recorded, and a *diſtringas* ſhall go againſt the *jur. ad triand'*, and againſt the defendant, to receive his judgment; but if he comes in at the

Vid. 2 Cr. 36. 1 Vent. 60. 2 Saund. 45.

Jo. 412, 413. 1 Cro. 517

Perſonal action

1 Cr. 511.

Eſſoins in a perſonal action

the day of *nisi prius*, he saves his default; but if he does not, the default is peremptory, and final judgment shall be given thereupon. And it is to be observed, that this one essoin and one default that the statutes give, must be at the first continuance after the issue; for if the defendant should appear at the first continuance, *viz.* at the *venire fac'*, he shall neither be essoined, or have a default saved at return of the *distringas* but judgment peremptory shall be given on such default. 2 *Inst.* 217.

Default peremptory.

If defendant imparl to a day in a personal action, and he does not appear at the day, judgment final shall be given against him; for the default is peremptory to him, and there is no process to bring him into Court again. *Vid.* 38 *H.* 6. 33. In debt the defendant pleads in abatement to the writ, to which the plaintiff imparls, and at the day given the defendant makes default: judgment final is upon the default, though the plea was only in abatement, 18 *E.* 4. 7. In trespass the defendant demurred, and made default at day given, and judgment final. In debt upon an obligation, defendant pleads a release, and after demurrer day is given, and default is made by the defendant at the day, judgment final shall be given: *Vid.* 1 *H.* 7. 11. In trespass defendant imparls, and makes default at the day, judgment final shall be given: so in debt, 11 *H.* 7. 5. and the case in 2 *Cr.* 357. was remembered, where a judgment in an inferior court was reversed for this error; that the defendant being essoined, and making default at the day given by essoins, they gave a further day when it should be a judgment by default.

Imparlance and default in a personal action.

Abatement in debt.

Demurrer in trespass, &c.

Judgment final.

So now, what stuck with the Court was, whether

Whether here judgment

should be upon the demurrer, or upon the default.

whether judgment should be given upon the demurrer against the defendant, or upon the default; that is, whether he being out of court as to one issue by the default, he could be present in court as to the issue in law upon the demurrer, so that the Court might give judgment thereupon: and as to this point, the case was, a defendant in two several trespasses *pleads* an ill plea to one, on which plaintiff demurs, and joins issue upon the other, and makes default at the day of *nisi prius*; whereupon the inquest is taken by default as to the issue, and contingent damages upon the demurrer. And *Ward*, for plaintiff argued, that judgment ought to be upon the demurrer.

Diversity as to defaults of the defendants.

1. This is not such a default on which judgment can be given, and he took this diversity, that wherever in a real action the default is saveable, so that *grand* or *petit cape* shall go, there in a personal action a default is not peremptory, but there is indeed a proper process to issue, and bring the party into court. As for the purpose in a real action after imparlance *prece partium*, or upon essoin, if the party having chose his day fail thereupon, peremptory judgment shall be thereupon, and the lands seised; and in that case, judgment would be likewise peremptory in a personal action; but if the default were upon the return of a process, which is saveable in a real action, there judgment peremptory ought not to be in a personal action, because there the day is not taken or chosen by the party, but given to him by the court, and it seems but reasonable he should be more severely used upon his default at his own day, than at a *dies datus* by the Court.

As to default of plaintiff, &c.

But this is only in reference to defendants; but

but in case of plaintiffs, they are in many cases demandable at day given to pursue their writ: but in case of defendants, upon default at a day given before plea pleaded, there shall be no judgment peremptory. *Vid.* 7 *H.* 6. 19, 41. 19 *H.* 8. 6.

In trespass the defendant appears upon the exigent, and day is given over to another term, at which the defendant makes default, and *per Cur.* plaintiff can only have process *ad respond.* And if he fail thereat, then three *capias*'s and *exigent* as before; and he quoted 20 *Ed.* 3. 12. 2 *H.* 4. 1. *pl.* 3. 2 *H.* 4. 4. 11 *H.* 4. 31, 32. 20 *H.* 6. 44. *Jud. Reg.* 1 *a. b.*

Breve ad audiendum judicium.

The writ of *ad audiend. judicium* was of great use then, though now altogether disused.

37 *H.* 6. 29. gives an account of it, that formerly, when a demurrer was joined in a real or personal action, this writ used to go to bring parties to hear judgment, but now the course is, that he attend at his peril. 4 *H.* 6. 29. That the defendant is not demandable on demurrer, but the plaintiff is only to appear and pray his judgment. Just as upon a writ of inquiry of damages, the defendant has no day in bank; and in *Common Pleas*, neither plaintiff nor defendant have a day given them, but plaintiff is to attend for his judgment. *Cro. El.* 75. 144.

But plaintiff has day by course of *K. B.* *Yel.* 97. 1 *Rol. Ab.* 486. Now here, though there be but one *ve. fa.* to try the issue, and inquire of the contingent damages, yet these are as two distinct matters, for anciently the course was not to put both together; but that is new, and for ease and dispatch, and here the

Here are two distinct matters in the ve. fa.

the jury might have been discharged of the issue, and yet enquire of the damages as an inquest of office. 16 *Ed.* 4. 1. 2 *Inst.* 440.

How, if judgment were to be upon the default.

2. He insisted on it, That if judgment were to be upon the default, it must have been given at the *nisi prius*, and that being not done, and the default being for the plaintiff's advantage, he might waive or release it, and quoted 42 *Ed.* 3. 1. and the defendant upon a writ of error can never take advantage of the matter. *Vid.* 2 *Saund.* 46.

Demurrer waived by default in a personal action.

Darnel contra. Wherever there is a demurrer in any personal action, and the defendant makes default at the day, the demurrer is waived. *F. Default*, 59. 38 *H.* 6. 33. In personal actions, if the parties are at issue or demurrer, and after defendant makes default, the judgment shall be upon the default, and the demurrer is waived. *Bro. Default*, 58. 39 *H.* 6. 16, and continued to 18. *Bro. Default*, 73. *Fitz. Jour.* 33. *Process*, 147. 45 *Ed.* 3. 3. And as to objection, That if judgment were to be given on the default, it should have been immediately. *Answer*, All the judges of *nisi prius* could do, was to record the default.

When inquest may be taken by default, before count, or after, &c.

POWELL, *Justice.*—I do not find but the parties are demandable, both in case of day given upon demurrer, and upon issue joined; but after issue, inquest may be taken by default. But in debt, suppose the defendant comes in upon the *exigent*, and the plaintiff, as he may, prays a day; there it being a day had on prayer of the plaintiff before count, if defendant make default, process shall go to bring him in; but if the plaintiff had counted, and before issue the defendant had made default, if plaintiff will demand him, he may have

have judgment upon the default; and I take it to be the ſame upon demurrer where day is given at which defendant makes default, for there judgment final ſhall be, and no proceſs *ad audiend' judic'*. *vid.* 18 *Ed.* 4. 7. And the book of 20 *H.* 6. 44. is miſtaken by *Fitz.* for the book is full, that judgment muſt be upon the default. 44 *Ed.* 3. 1. After demurrer in perſonal action, that proceſs ſhould go *ad audiend' judic'*; but before demurrer or iſſue joined, if day be given after pleading, a default will be peremptory, and judgment final upon default, but the uſage now is not to demand them. Modern

It is very hard to make a default at a day given by court on demurrer, peremptory; but here is an iſſue as to part, and a demurrer as to the other part, and a *ve. fa.* to try the iſſue, and inquire of damages. And day is given with a *niſi prius*, which day of *niſi prius* is in truth but to try the iſſue, and inquire of damages, but the day on demurrer is *ad audiend' judic'*; ſo that in truth the day given *ad triand. exit'*, *&c.* has nothing to do with the day of demurrer, and it is not neceſſary that the defendant ſhould have a day on the writ of inquiry; ſo that the day *ad audiend' judic'*, in this caſe, is the day in bank, and the default at *niſi prius* is only to that for which defendant had a day there, that is, to try the iſſue, and the taking the inqueſt by default is a waiver of taking advantage of judgment by default.

Nor do I know where plaintiff may, in a perſonal action, take advantage of a default upon the inqueſt; but where the defendant pleads a releaſe or acquittance, and at iſſue makes default, there indeed he may pray judgment

Quod Holt concessit.

ment upon the default; or that inquest be taken by default; but after he takes inquest by default, he is too late to pray judgment by default, for his taking the inquest is a waiver of the judgment by default, and judgment must be upon the verdict, and not upon the default, that being waived by prayer of inquest. Upon an issue of *non est factum*, you cannot take a judgment by default.

Holt.—The question first is, Whether if default be in a personal action after declaration, and day given over, either by imparlance or any other day; whether, I say, this be so peremptory that judgment final ought to be upon that default; and I think in case of imparlance, whether to a day in the same term, or another, judgment final ought to be. 18 *Ed.* 4. 7. 36 *H.* 6. 19. and 19 *H.* 6. are full in the point, without taking any difference.

Two defaults in action real, and but one in action personal.

Now then upon demurrer, because parties are at issue in judgment of court, suppose it had been in real action, and *Cur' adv' vult*; defendant makes default, *petit cape* must go, and he does not save his default, shall not judgment final be given upon the default? If it be so when there is a demurrer in a real action, is it not much stronger in demurrer in a personal action? And it is not less peremptory upon demurrer than imparlance; for if default be after demurrer on day given in same term, it is peremptory; that is, if party does not come at such day in the same term, it is a departure in despite of the court; and there in real action, no *petit cape* shall go, but judgment final shall be on the demurrer, and not upon the default; so that, if the book of *H.* 6. be law, as sure it is, judgment is as much to be given upon default in personal actions as in

in real, only that there muſt be two defaults in a real action, and but one in a perſonal one.

19 *H.* 8. 16. If party comes in upon proceſs in perſonal action, or upon *cepi corpus*, or *exigent*, and day is given *prece partium*, that is, by conſent of parties, at which day default is made, no judgment can be given. Why? Becauſe there is no declaration. But if it were after declaration, and at a day default had been, it were peremptory. So is the caſe of 7 *H.* 6. 19. 41. one in cuſtody of marſhal upon a *premunire*, is charged by bill in nature of an appeal of *Mayhem*, and day is by conſent of parties, at which there is a default: there cannot be judgment final, becauſe though he had been charged in cuſtody of the marſhal, yet he never had been in court; but if the default there had been upon an imparlance, it had been peremptory, and final judgment had been thereupon. Indeed, in annuity, which, though perſonal, yet partakes of the nature of a real action, for there is final judgment given to recover an inheritance, and the proceſs in annuity therefore imitates that of a real action, after default there ſhall be *a diſtringas ad audiend' judic'* to afford the defendant an opportunity to ſave his default, becauſe though the recovery ſhall charge the perſon only, yet it may be of an inheritance. So in a *ſecta ad molendinum* if defendant make default, there ſhall be a *diſtringas* to give him liberty to ſave his default, for that alſo follows the nature of a real action, as being of freehold or inheritance. *F. N. B.* 123. *D.*

Where day is given, prece partium, before declaration, &c.

7 H. 6. 19. 41.

Appeal.

Annuity.

Secta ad molendinum.

Ay, but this is like an inquiry of damages. 1. If judgment be againſt a defendant, and an inquiry of damages, he has no day given him thereupon,

Diverſity where only inquiry of damages, and where both iſ-

fue and demurrer.

thereupon, and therefore he can make no default; for the Court have already given their judgment againſt him, and he thereby is quite out of court, and the inquiry is only to aſcertain the damages. But where there is both iſſue and demurrer, and before judgment on the demurrer a *ve. fa.* goes to try iſſue, and inquire of damages, whereupon defendant has day, on which he makes default; is not that a default to the day of demurrer as well as of iſſue? For though they be in truth different, *viz.* one the day of *niſi prius*, and the other the day in bank, yet in conſideration of law they are the ſame. If there be two defendants who plead ſeverally, one of them demurs, and judgment is given againſt him, before iſſue joined with the other, then he againſt whom the judgment paſſed has no day in court, yet the plaintiff may continue proceſs againſt the other; but if in that caſe the iſſue were to be tried before judgment, then the defendant who demurred has a day, and that is the ſame that the other has by the *niſi prius*, which by law is the ſame with the day in bank. A default in real action at the day of *niſi prius* is the ſame as a day in bank, and as fatal, for they are not to be ſevered. And why not ſo in a perſonal action, and it is incident to the trial of the iſſue, to inquire of the damages upon the other iſſue in law. So if the day of *niſi prius* be the ſame with the day in bank, the two have the ſame day; but here, though it be one defendant, yet you would have him be out of court as to iſſue, by reaſon of default at *niſi prius*, and in court upon the demurrer in the day in bank, that is, in and out of court the ſame day.

If

If there be default after demurrer joined, judgment shall be upon the default, or upon the demurrer; and when continuance is given, the appearance of both parties are entered at the continuance day, and anciently they used to demand the parties; so then they lay at lurch for one another, but now these are things of course. Judgment upon default after demurrer joined, &c.

And whereas my brother *Powell* affirms, that there can be no day on the demurrer but the day in bank: I would suppose there are two defendants, one pleads to demurrer, and the other pleads to issue, and *ve. fa.* goes to try issue, and inquire of contingent damages; before the day of *nisi prius* and *puis darrein continuance*, a release is made by plaintiff to the defendant that demurred; can he plead it at *nisi prius*? And if he fails in doing it, can he plead it in bank at day there? And *Powell subito* allowed he might plead it at *nisi prius*, but not in bank; but after seemed to doubt, whether after demurrer a plea *puis darrein continuance* could be pleaded. Vid. Hob. 81.

If at a day given upon a writ of error defendant makes default, the writ of error may go on, and the judgment be affirmed, because it is no new judgment that is given for the defendant, who is now out of court by his default, but only his former judgment affirmed and ratified; but in that case it were hard to give the defendant costs upon the statute: so if a defendant make default, plaintiff may have judgment; for a man that is out of court may have a judgment given against him, though not for him: And he wished the defendant's counsel to take care how they made default; for after default, though plaintiff could not prove his declaration, so as verdict A man out of court may have judgment against him, though not for him.

 would

would be for him; yet it were very hard to give him a judgment, for he was out of court.

At another day another point moved in this case, was, whether judgment might not be given against the defendant, upon the issue, though looked upon as immaterial, and a jeofail? Because the defendant confessed the trespass in his plea, and made no good justification: so (as was urged) judgment ought to be given against him by confession. And hereupon Ch. J. *Holt* took diversity, if one confess the cause of action, but pleads matter, which, if well pleaded, would bar the plaintiff, there it were hard to hold the defendant to such confession, and give judgment against him, as here the defendant indeed confesses the trespass, but offers such matter as if true and well pleaded would justify him: but where the fact is confessed, and such matter of justification offered, which though never so true, and well pleaded, would not bar the plaintiff, there judgment may be upon the confession, as in an action for words, for calling plaintiff a thief. Defendant justifies, for that the plaintiff received a thief, and pleads it ill; there judgment may be upon the confession, for that matter could not have been so pleaded, as to have justified the words.

If defendant confesses the trespass, but offers good matter of bar, if well pleaded. Vid. Hob. 69.

Hard to hold the defendant to his confession.

Aliter, Where the matter confessed would not bar the plaintiff.

In the further debate of this case, the court held, that if there be two defendants who sever in pleas, and one is found guilty, and an issue not helped by the statute of *jeofails* is tried for the other, who having made default is out of court, so as there can be no repleader, and of consequence the judgment must be to quash the writ or bill, it necessarily shall be abated thereby as to the other; for though one de-

Two defendants sever in pleas, &c. so as there can be no repleader.

fendant

fendant may be acquitted in part, and condemned in part of a trespass, or one of two condemned, and the other acquitted, yet the writ cannot abate as to one, and subsist as to the other; and as to trespass against two, when the acquittal or discharge of one shall discharge the other. *Vid.* 2. *Cr.* 131. Trespass against two for taking gun and dagger; one justifies the taking in his own defence, being assaulted by plaintiff; the other pleads not guilty, and is found guilty, and damages against him, and the other issue is found for the defendant, there judgment shall be against him that is found guilty; for the other's plea does not destroy the plaintiff's title for good and all: but if trespass be against two for taking the plaintiff's goods, and one pleads not guilty, and is found guilty, and the other justifies the taking by gift, &c. and his plea is found true, there for as much as the defendant's plea entirely destroyed the plaintiff's cause of action, he shall have judgment against neither.

When the acquittal of one trespasser shall discharge the other.

Hob. 54. Where the plea of one of the defendants intirely destroys the plaintiff's action.

But the last day of *Hilary term* following, the whole Court declared, That they were of opinion, that the issue was helped by the statute of *jeofails*, and for so much gave judgment for the defendant, and as to the demurrer, gave judgment for the plaintiff, without any reason. *Vid.* 2 *Saund.* 318, 319.

Per Cur. This issue helped by statute of jeofails.

In replevin, plea in bar, with an absq. hoc. *replication to an issue, demurrer to the replication, and concludes in abatement. Judgment final in* C. B. *for the plaintiff.* Qu. *If repleader can be upon demurrer. Of a plea in bar concluding in abatement. Of matter of abatement, and concluding in bar.*

Crosse v. Bilson, Hil. 2 Ann. B. R. 6 Mod. 102. Error in B. R

Replevin for taking his mare in *quodam loco*, called *The King's Highway*. The defendant *cognovit captionem*, damage fesant, *in quodam loco*, called *The Queen's Highway*, as bailiff to the Lord *L.* whose freehold the place where, is. *Absque hoc*, That he took *equam pred' in pred' loco*, called *The King's Highway*; *pro ut* the plaintiff *adversus eum narravit, & hoc paratus est verificare, unde petit judicium & return', &c.* Plaintiff comes and says, *Quod cognoscere non debet, quia dicit quod dicto tempore quo, &c. cepit equam pred' in pred' loco tunc*, called *The King's Highway, modo & forma pro ut pred' plaint' allegavit, and hoc petit quod inquiratur per patriam.* The defendant demurs, and concludes, *Unde (ut prius) petit judicium, & quod narratio' pred' cassetur:* judgment final in *Com' Banc'* for plaintiff, and affirmed here upon error.

1. That all the matter of conusance is waived by the absque hoc, &c.

Holt, *Ch. Just.*—The whole point of the case, take it the strongest that can be, is, after a plea in bar, and a replication, the defendant demurs to the replication, and concludes in abatement, and sure there judgment final ought to be given; and they all agreed, that all the matter of conusance in the plea was waived by the *absque hoc*; and the conusance in a different place from where the declaration lays the taking, is in truth matter only proper in abatement;

abatement; but the conclusion turning it into an avowry, makes it a plea in bar, as all avowries are, and final judgment is always given upon them, if they go for the avowant. They also agreed, that where matter in abatement is pleaded in bar, and concluded in bar, judgment final ought to be given.

2. That where matter of abatement is pleaded in bar, &c. judgment final ought to be.

But it was objected, That the demurrer being ill concluded, *viz.* in abatement, and contrary to the bar, it was to be looked upon as if there were no conclusion at all, and it would be a discontinuance, and judgment ought to be by *nil dicit.*

To which the Court answered, That the conclusion to the demurrer was, *unde petit judicium (ut prius)* and that is well enough, and according to the conclusion of the plea in bar, and the subsequent words, *& quod narr' cassetur*, being inconsistent, shall be rejected.

So *per tot' Cur'* the judgment was affirmed.

Judgment affirmed.

Note, here *Powell* positively said, That repleader could never be upon demurrer, but is always after issue; though the old books seemed to make a question of it, yet there were twenty authorities in the new books of it: and yet *Brotherick* seemed as earnest of a contrary opinion at the bar, *tacente Holt, Ch. Just. & Cur' reliquâ.*

If a repleader can be upon a demurrer.

Note, In the debate of this case at the bar, it was agreed, That the matter of this plea was matter in abatement, *viz.* a variance in the places.

That in this case the matter was abatement, viz. a variance.

2. That in replevin the defendant is both actor and defendant. As defendant, he may abate the plaintiff's writ, and that were vain for him to do if he could not have a return, and therefore he must proceed from his plea in abatement to make conusance; for his action

 being

being a claim of right to diſtrain, he ought to make title to it againſt the plaintiff in the replevin who claims property in the diſtreſs.

Where defendant claims property.

Yet this rule would be explained; if defendant in replevin claim property in himſelf, he ſhall have return without conuſance, becauſe his plea deſtroys the plaintiff's title: ſo if he lays property in a ſtranger, and make no conuſance, if that matter be admitted by the plaintiff, there ſhall be a return without conuſance; for in that caſe by the admittance, the plaintiff's property is deſtroyed. But in all pleas that do not ſhew the property out of the plaintiff, there muſt be a conuſance made, and the plea is what only is anſwerable, and not the conuſance, for to traverſe that would be a diſcontinuance, 8 *Ed.* 4. 41 b. *Cro. El.* 372. *Mic.* 2. *W.* and *M.* in *B. R. Hall* verſus *Foot*.

Vid. 2 Lev. 92. 1 Vent. 127. 3 Cro. 896. 2 Cro. 519.

If plea be in bar, and concludes in abatement.

If a man plead matter in bar, and conclude in abatement, it ſhall be taken for a plea in bar from the nature and reaſon of the thing; for the plaintiff can have no writ, if he has not a cauſe of action, and therefore the Court will take the plea in bar. 37 *H.* 6. 24 a. 36 *H.* 6. 24.

Vid. 1 Vent. 130.

If the plea be matter of abatement and concludes in bar.

If one pleads matter of abatement, and concludes in bar, *et petit judicium ſi pl. actionem habere debet*, though he begin in abatement, and the matter be alſo in abatement, yet the concluſion being in bar, makes it a bar; and the reaſon is, becauſe you admit the writ by concluding ſpecially againſt the action, 18 *H.* 6. 27. 32 *H.* 6. 17 b. 36 *H.* 6. 18. 22 *H.* 6. 53 b.

How the defendant in replevin may take advantage of a variance.

And here *Holt, Ch. J.* ſaid, That in replevin, if the defendant will take advantage of a variance in the place where the taking is laid, from that in which really it was, he muſt plead it in

in abatement, and begin either *petit judicium de breve*, or *de narr' quia dicit*, the cattle were taken in ſuch a place, *abſque hoc*, that they were taken in the place in the declaration. Then indeed he comes, *et pro retorn' habendo* diſtinctly; he ſays, he avows the taking in the place mentioned in the inducement of his traverſe, damage *feſant*, or for rent, *&c.* To which no anſwer is to be given, but all is to depend on the plea in abatement; and it is a proper concluſion in replevin to ſay, *nude petit judicium & return' averior'*, without ſaying any thing of damages, for they are given by the ſtatute. Concluſion.

In quo warranto, *as to a ſuppoſed mis-direction of the judge, that defendant could not prove a mode of ſwearing, contrary to what he had ſet forth in the record; the merits might be with the defendant, but his plea wrong, Court gave leave to move to ſet aſide the verdict, and that a* repleader *ſhould be awarded, one of the iſſues joined, and verdict, being impertinent and void, other iſſues were found for the King (as well as this) but without evidence.—After long argument on the doctrine of* repleader, *all the verdicts ſet aſide, and defendant had leave to amend his plea, whereon the immaterial iſſue was taken, on payment of common coſts.*

The defendant had pleaded to an information in nature of a *quo warranto* exhibited againſt him "to ſhew by what authority he "acted as a mayor of this borough," a title of election and ſwearing *under* a MANDAMUS purſuant to 11 *G.* 1. *c.* 4. but the *ſwearing* was (by miſtake) ſet forth to have been in the ſame manner as it ought to have been in caſe the

Monday, 9th May 1757.
Rex v. Roger Phillips, mayor of Carmarthen, F. 30 G. 2.
1 Burr. 292.
The defendant elected mayor, and ſworn under a mandamus: by

mistake alledged swearing as if upon a charter-day.

the election had been upon the CHARTER-day.

Upon the replication, no less than fourteen issues were joined: which went down to be tried before Ld. Ch. Baron *Parker*, as Judge of *nisi prius*. But one of the issues (the 9th) was taken upon the *swearing* thus (erroneously) alledged to be before such persons as were only proper to preside UPON the CHARTER-DAY; *(just as if it had in fact been an election under* THE CHARTER); which was a mere *mistake* in the defendant's plea; for his REAL *swearing* in fact was *right*, *viz.* AGREEABLE to *the directions of* 11 *G.* 1. concerning the manner of being sworn under and pursuant to a writ of *mandamus*. The plea was worded thus, as to his being sworn in, *viz.* "That after the defendant had been so "elected and chosen to be mayor, *&c.* and "before he took upon himself to execute the "said office, to wit, *at that* SAME *meeting and* "*assembly* so *holden* upon the said *Friday*, the "said 30th day of *May* in the 28th year "aforesaid in manner aforesaid, he the said "*Roger Phillips*, IMMEDIATELY *after* his said "election, did *then and there*, ACCORDING TO "*the* DIRECTIONS of *the* LETTERS PATENT *of* "*the said late King* HENRY *the* 8*th*, TAKE *his* "*corporal oath*, upon the holy Evangelists of "God," BEFORE *John Evans* MERCHANT, *George Jenkins*, *Daniel James*, *William Sears*, *Lazarus Thomas*, *Samuel Morgan*, *John Evans* CARPENTER, *John Evans* CURRIER, *Richard Leigh*, *George Bayle*, *Thomas Richard*, and *Lewis Philipp*, then and there being TWELVE *discreet and honest men of the* BURGESSES of the said county-burrough, rightly, well, and faithfully to execute the said office of mayor of the

the ſaid county-burrough, in all things touching and concerning the ſaid office; they the ſaid *John Evans merchant*, *G. J. D. J. W. S. L. T. S. M. J. E. c. J. E. c. R. L. G. B. T. R.* and *L. P. then being* TWELVE *diſcreet and honeſt men of the* BURGESSES *of* the ſaid county-burrough, *then and there* APPOINTED ACCORDING *to the* DIRECTIONS *of the ſaid* LETTERS PATENT laſt before mentioned, by the ſaid then common-council of the ſaid county-burrough, BEFORE WHOM the ſaid *Roger Phillips*, ſo elected and choſen mayor of the ſaid county-burrough as aforeſaid, WAS *to* TAKE *his ſaid* OATH: and that he the ſaid *Roger Phillips* was THEREUPON, then and there, *in due manner*, *admitted into the ſaid office of* mayor of the ſaid county-borough.

BY VIRTUE WHEREOF he the ſaid *Roger Phillips*, on the ſame *Friday* the ſaid 30th day of *May* in the 28th year aforeſaid, and from thence continually afterwards, for, &c. was mayor, &c. *And by* THAT *warrant*, he the ſaid *Roger Phillips*, on, &c. and from, &c. until, &c. did " there uſe and exerciſe the ſaid " office of mayor, &c. and for and during all " the ſaid time, did there claim, &c."

The *Lord Chief Baron*, who tried the cauſe, reported that he was of opinion, upon the trial, " That upon the 9th iſſue, the defendant *could* " *not give evidence* of a *different* ſwearing from " what he had *alledged upon the record*;" and " That upon the 10th iſſue" (taken upon the allegation of being *by virtue thereof* mayor, &c.) " he *could not vary* from the *title before* " *ſet out*, by virtue whereof he *claimed* to be " mayor." And he had directed the Jury to find for the King: and they found a verdict accordingly. And he alſo reported " That no

" evidence

" evidence was entered into, upon *any* of the issues; and that verdicts were found for the " *King* upon *all* of them: but that this was " *agreed* to be *without prejudice* in any *future* " *trial*."

Mr. *Norton*, Mr. *Morton*, and Mr. *Price*— for the defendant, had thereupon moved for and obtained a rule for the prosecutors (who had thus gotten a verdict) to shew cause " why there should not be *a new trial*;" upon an insinuation " that the Judge who tried the " cause, had *mis-directed* the Jury:" which *mis-discretion* consisted, as they alledged, in this—*viz.* " that the Judge had precluded " the defendant from giving any evidence to " prove his swearing, *as set forth* in the said " 9th issue; the Judge apprehending, and so directing the Jury, that it could be of *no* " *kind of service to the defendant*, to be ad- " mitted to prove an issue, which if *proved or* " *even admitted*, could NOT *at all tend to make* " *out his right*;" for that if this swearing *as* UNDER *a* CHARTER-ELECTION were to be *admitted*, yet still it would not appear *in* ANY *part of the record*, that HE was *regularly sworn* UNDER A MANDAMUS election; which was the *species of election* under which he *claimed*.

Sir *Richard Loyd*, Mr. Serjeant *Poole*, and Mr. *Aston* were prepared as they said, to shew cause, by convincing the Court, " that the di- " rection of the *Judge was* RIGHT; and con- " sequently that the verdict *ought to stand*."

Lord MANSFIELD.—The direction of the Judge was certainly *right*: therefore, if you should prevail in this application for a new trial, it could be of no service: for, AS *the record stands*, the *same* direction must be *given again*.

Yet

Yet I am very desirous to *cure* this slip, if possible: for the *merits* have *never been tried*.

Consider whether the verdict may not be set aside; and the parties admitted to *plead* AGAIN.

The rule was enlarged; with this *addition*, *viz.* to shew cause "why the verdict should "not be set aside, AND *a repleader awarded.*"

Mr. Serjeant *Poole*, for the prosecutor, now shewed cause against setting aside the verdict and awarding a repleader. And he alledged that, though there should be a repleader awarded, yet the *whole record* must neverthelefs *stand* as it is at present.

As to repleaders in general, he cited 6 *Mod.* 1. The case of *Staple* v. *Haydon* (1st resolution): it can only be on such an impertinent issue, as that the court can give *no* judgment upon. Vide ante.

Mr. *Norton*, Mr. *Morton*, and Mr. *Price*, *contra*, for the defendant—the issues are not all found against us, *absolutely*; but *without prejudice* to any future dispute, except as to the 10th issue.

Mr. *Norton*, Mr. *Morton*, and Mr. *Price*, stated the mistake: which they said was thus, *viz.* the defence set up was "An *election of the* "*defendant under a mandamus*, issued pursuant "to 11 *G.* 1." And in setting out his oath of office, he avers it to have *been* DULY *taken*; and shews it to be an *oath*, taken by him *upon this election*, and sets out the *right and proper oath of office*; but the plea 'tis true, goes on (following, by mistake, a precedent of a plea of an oath of office taken under an election upon the proper *charter*-day) and alledges it to be a swearing *at the same meeting so holden*, &c. BEFORE *persons* who were only proper to

preside

preside upon the CHARTER-*day*; *viz.* (BEFORE *twelve burgesses, &c*)

Which swearing, *before* these *improper* persons, they urged to be totally *immaterial:* and that, for the sake of attaining justice, it ought to be *some* how or other set right; the TRUE *question* having *never been tried, viz.* "Whether he took the oath of office, *agreeably to the* DIRECTIONS OF 11 G. I."

Therefore it shall either be *amended,* OR *a repleader awarded:* for upon the present record, there is *no* justification *at all*; and therefore the issue joined is *totally immaterial.* The case of *Staple* v. *Haydon,* 6 *Mod.* 1. is almost in point. 1 Ld. *Raym.* 707. *S. C.* [1 *Salk.* 173, 216. *S. C.*]

This is a good plea in *substance*; but ill pleaded in point of *form.*

They *ought to have* DEMURRED to this part of the plea; and *not* to have taken *issue* upon it; for it is a matter of *law,* "Whether the taking *this* oath would have justified the defendant:" and a verdict cannot make that good, which the Court sees cannot be in law. Therefore this verdict is utterly *void:* just like that in *Hobart,* 112. *Tasker* v. *Salter.*

And such repleaders, in informations, are no novelties; for in 1 *Ventris,* 122. the case of *Reynell* v. *Heale**; a repleader was awarded, because the issue was mis-joined.

* N. B. This was a qui tam information at least; if not a qui tam action: the book is inconsistent with itself; but the title of the cause shews that it was an action.

And they *offered to pay costs,* in order to have this matter set right; and insisted that this is but just and reasonable; especially, as many *other* persons rights depend upon the right of this mayor.

They also cited *Cro. Eliz.* 245. the case of *Love* v. *Wotton*—where a repleader was awarded after verdict; the defendant having mis-

§ pleaded

pleaded the ſtatute. The reaſon of awarding the repleader there, muſt be "becauſe the "*true merits* had *never been tried.*"

They even urged farther, that it might well be taken, upon the face of the record, "that "he *was* ſworn before the *proper* perſons:" it being alledged "that it was at the SAME "meeting then and there ſo holden."

But they inſiſted that at moſt, this is *only form*.

As to repleaders in general—they cited 1 Sir *J. S.* 394. the caſe of *Rex* v. *Philips*, mayor of *Bodmyn*, where the defendant's title was *clearly defective*, and confeſſed an uſurpation; and therefore, as the *merits appeared* to be againſt the defendant, the repleader was not indeed there granted: but the general poſition ſeems to be, "that it *might*, *otherwiſe*, have "been granted."

Mr. Serjeant *Poole*, Sir *Richard Lloyd*, Mr. *Aſton*, and Mr. *Nares pro rege*—argued that it is needleſs to grant a repleader, where there is *ſufficient* appearing upon the record, whereupon to give judgment *againſt* the party, *excluſive* of the part which is pretended to be immaterial.

Nor ſhall a repleader be awarded, where the defendant has ſet forth a *defective title.*

Now certainly this is a *defective title:* he appears to be ſworn before *improper* perſons: and does *not at all* appear to *have been* ever ſworn before the *proper* ones.

This is *not* a mere *defective* MANNER OF PLEADING; like *Cro. Jac.* 434. the caſe of *Holms* v. *Broket*—where iſſue was joined on a plea of payment *before* the day; or *Hob.* 112. the caſe of *Taſker* v. *Salter*; where the iſſue (upon *the way*) was in effect no iſſue at all.

But

But this is abſolutely a *defective* TITLE; a ſwearing before improper perſons: and is like
V. ante. 6 *Mod.* 1. the caſe of *Staple* v. *Haydon*. And they cited *Cro. Eliz.* 214. the caſe of *Lacy* v. *Reynolds*; where, though the iſſue was immaterial, yet, the plea confeſſing the words, the court gave judgment as upon a confeſſion. So
V. ante. *Carthew*, 371, the caſe of *Jones* v. *Bodinner*; and 1 *Salk.* 173. S. C. a like reſolution. So,
V. ante Eſſay II. IX. (8.) 1 Ld. *Raym.* 390. the caſe of *Pitts* v. *Polehampton*.

But if a repleader ſhould be granted as to THIS iſſue, yet *enough* (beſides this) will ſtand upon this record, to intitle us to judgment for the king.

Repleaders are never awarded for the ſake of *parties*; but for the *ſake of the* COURT.

And this is the reaſon why there are *no coſts* upon repleaders: as appears by 2 *Salk.* TITLE REPLEADER. [FO. 579. which is an abridgment of the caſe of *Staple* v. *Haydon* in 6 *Mod.* 1. and 1 Ld. *Raym.* 707].

Nor ſhall repleaders ever be awarded, where *ſufficient appears upon the record*, *whereupon* the court can *give judgment*. They ſhall not be awarded, ONLY becauſe the party has MISTAKEN *his caſe*: they ſhall never be awarded, but where the iſſue is ſo *immaterial* that the *court* cannot tell how to give judgment.

V. ante. In the caſe of *Serjeant* v. *Fairfax*, *in* 1 *Lev.* 32. it is laid down by *Twyſden*, and agreed by the Ch. Juſtice and *Wyndham*, that "An immaterial iſſue is, where, upon the verdict, "the court can not know for whom to give "judgment; whether for the plaintiff, or for "the defendant."

It depends upon the plea pleaded; not upon the real merits: for though the iſſue be *improper*,

proper, yet judgment ſhall be given; as is expreſsly laid down in the ſame caſe of *Serjeant* v. *Fairfax*—1 *Lev*. 32. "If an IMPROPER "iſſue is taken, and verdict given thereon, "judgment ſhall be given thereupon; be it "for the plaintiff, or for the defendant." *Cro. Jac*. 288. the caſe of *Tampion* v. *Newſon*, and *Bridget his wife*: the plea of the feme without the baron was no plea at all, nor confeſſed any thing. In *Bro. Repleader* 55. it did not appear how much the executors had; who pleaded "*riens inter maines*," which was found againſt them. *Cro. Eliz*. 245. the caſe of *Love* v. *Wotten* (where the ſtatute of uſury was miſrecited) was a caſe where *no judgment could be given*: for the court was *bound* to know the ſtatute; and that there was no ſuch ſtatute as was pleaded, which was a ſtatute made the *ſixth of February*.

In the preſent caſe here is NO FAULT *in the pleadings*: therefore, where ſhall the repleader begin? This caſe is NOT *the ſubject-matter of a repleader*: this is *only a* DEFECTIVE TITLE.

It would be an ERROR, to grant a repleader, where the court *can* give judgment *upon* the pleadings *already* before them.

Now here, the defendant who claims to be mayor has NOT *ſhewn* "that he was *ſworn* be-"fore the *proper* perſons:" and the Court *cannot preſume it*. He is aſked, "*quo warranto*," he acted as mayor: and his defence is *this*, "by a proper election and (*improper*) ſwear-"ing;" and that "*Eo warranto*," he acted as mayor.

But this plainly appears to the Court to be no warrant at all: therefore, the Court muſt give judgment *againſt* him.

And the Chief Baron certainly determined right; for a man cannot plead *one* case, and then prove *another*.

Hob. 112. The case of *Tasker* v. *Salter* is not like this case. *This* is a *fact*, on which the Jury *have* judged.

And surely it does not follow, nor can it be taken upon the face of this record, that because he was sworn *at* THAT ASSEMBLY, he must therefore be sworn before the *proper* PERSONS. On the contrary, it is most manifest that He has *not* set out a *complete title* to exercise the franchise: and therefore the Court must give judgment against him.

The *other* issues were *never proved*; and even this bad title, set up by this issue, is found *false*; *viz.* "That he was NOT so *sworn in*, as "he has pleaded."

And judgment shall be given against the defendant even upon an issue misjoined, *if found* FOR *the plaintiff*, *Cro. Eliz.* 778. the case of *Dighton* v. *Bartholomew*, 5 *Co. Rep.* 43. *Nicholl's* case, *Cro. Jac.* 377. the case of *Edward Maria Wingfield* v. *Bell*, 2 *H.* 7. 11. *b. Rex* v. *Herle*; which case proves that if a man sets up a right, *different* from his true title, it shall be against him; and he shall *not* set up *another* title, *afterwards*.

The Court may here give judgment as upon a confession, when the issue is immaterial, and the mistake not amendable: and there shall in such case be no repleader. *Carthew*, 371. the case of *Jones* v. *Bodinner*, expressly, 5 *Mod.* 226, 227. S. C. *Cro. Jac.* 678. the case of *Johns* v. *Ridler*; where though the issue was immaterial, yet being found *for the plaintiff*, it was adjudged for him, upon the defendant's confessing of the ejecting.

V. ante.

In

In the case of *Love* v. *Wotton*, *Cro. Eliz.* 245. the court *could not* give a complete judgment.

Cro. Car. 25. The case of *Knight* v. *Harvy*, administrator of *Harvy*, *M.* 1. *C.* 1. (where the defendant pleaded an impossible judgment, and *riens en ses maines*, but only to satisfy it; and the plaintiff replying, the issue was found for the plaintiff, and he had judgment) is a case parallel to the present: for as the judgment there pleaded was a bad judgment, so this is certainly a BAD *swearing in:* therefore, the Court will here give judgment upon the *information*; as they did upon the plaintiff's declaration there, notwithstanding that impossible issue being found, it being found for the plaintiff.

Here *both* the election AND swearing in, ought to have been well pleaded; neither is a defence, of itself, alone. And the Court cannot take notice of the *fact*, *otherwise than* AS it has been *pleaded*.

Therefore judgment may be given, as upon a confession, in the present case: for the defendant *shews no right at all*, to act as mayor.

So that, upon the whole, judgment ought to be entered for the King, *upon the face* of this record: to prove which, they cited 2 *Strange* 873. the case of *Broome* v. *Rice et al' in C. B.* as in point: where, though the justification confessed the cause of action, in effect, yet the plaintiff replying "*de injuria suâ propriâ absq'* "*tali causa*," issue was thereon joined, and found for the defendant; but the verdict was set aside; and judgment ordered to be entered for the plaintiff, and a writ of inquiry of damages to issue.

 Mr.

Mr. *Norton*, in reply.—The SUBSTANTIAL part of this plea, is the "being *ſworn at this* "*aſſembly immediately after* the election: and "the PERSONS *before whom* the ſwearing is al-"ledged to have been," may be conſidered as *ſurpluſage*. *If ſo*, we ought to have been let in, at *niſi prius*, to prove our plea: *if* it is *not* ſo to be taken, we ought now to be let in, either to *amend*, or to *replead*.

This would plainly *be a good bar*, IF *well pleaded*; therefore the Court will, for the ſake of juſtice, grant a repleader.

The title ſet up by the defendant, is an *election under a mandamus*; and the defendant has accordingly ſtated an election made purſuant to the directions of the 11 *G.* 1. and a ſwearing-in *purſuant to it*: but he goes on, and particularly ſhews a ſwearing-in before *twelve burgeſſes*, the CHARTER-officers, (which ſhould have been alleged to be before "the perſons "directed by the 11 *G.* 1. *viz.* the then *pre-*"*ſiding officer*;)" and this, upon iſſue taken thereon, is found *againſt* him. Now ſurely this has *not* tried the MERITS: this iſſue was *quite immaterial*: and therefore there ſhall be a repleader; and this muſt be a repleader of our *whole entire* title.

But they ſay that "this is a DEFECTIVE title; "not a mere *improper* title: and that there-"fore judgment ſhall be given againſt the de-"fendant."

Now this is *not* the rule of repleaders. Indeed if the bar be evidently NOT a *good juſtification*, it is idle to grant a repleader: but *otherwiſe*, a repleader *ſhall* be awarded. In *Cro. Jac.* 5. the caſe of *Coxe* v. *Cropwell*, the huſband pleaded "Not Guilty," when no tort was ſuppoſed in him: ſo that this was a caſe

where

where the real queſtion had not been tried: and *therefore* the Court granted a repleader.

And the party who makes the firſt fault, may, notwithſtanding that, pray a repleader.

Wherever the Court ſee, upon the whole record, that the iſſue joined *will not try the true queſtion*, the Court will grant a *repleader*.

The caſe of *Serjeant* v. *Fairfax*, 1 *Lev.* 32. *p.* 13. *c.* 2. *B.R.* is ſtrongly for us. It was a *bad plea*; it proceeded originally *from the defendant*; an immaterial iſſue was joined; and a verdict was * *againſt him*: and *yet* a repleader was awarded; BECAUSE *the merits* HAD NOT *been* determined, and the Court could not therefore know *for whom* to give judgment. V. ante.

* No: The verdict was for the defendant; and the plaintiff moved for a repleader. Indeed Twyſden ſaid, that it was the ſame thing, "be the verdict "for the plaintiff, or for the "defendant."

But they ſay that "HERE IS *ſufficient* for the "Court to give judgment upon."

I anſwer, that theſe are not to be taken as *independent unconnected* iſſues; but as ONE ENTIRE TITLE, though conſiſting indeed of various diſtinct *parts*. And he ſaid HE could ſee no reaſon for the Crown's taking ſuch a number of iſſues, upon theſe *quo warranto* informations: indeed perhaps the ſingle iſſue of "NOT MAYOR," would take in the whole.

Lord MANSFIELD.—General rules, are wiſely eſtabliſhed, for attaining juſtice with eaſe, certainty, and diſpatch.

But the great end of them being "*to do juſtice*," the Court are to ſee that it be *really* attained.

In order to diſcover what was juſt upon the preſent occaſion, he ſaid he would conſider this caſe in two views; *viz.*

1ſt. Upon the mere foot of the *ſwearing*, as it is here pleaded and put in iſſue; and

2dly. What alteration is made by the *other* iſſues, and the *verdicts* upon them, found in the manner as they have here been.

Firſt—If *this* iſſue upon this ſwearing-in, had ſtood alone, this had been an *immaterial and void* iſſue; as it tends to *prove nothing*, *either* for the *Crown*, or for the *defendant*; and from which, *no concluſion* can be drawn, *either* way.

It appears too, upon the record, that this MIGHT *have been* ſo pleaded, *as* to have ſhewn whether he had, or had not a right; (ſuppoſing the queſtion to be *confined* to this ſingle iſſue.)

What is the rule of law then as to ſuch an *immaterial* iſſue joined, and *verdict* upon it?

It is, "that when the finding upon it does "NOT *determine the right*, the Court *ought* to "award a repleader: *unleſs* it appears from "the whole record, that *no manner of pleading* "the matter COULD *have availed*."

The principal caſes to prove this, are (amongſt many others to the ſame effect) 6 *Mod.* 2. The caſe of *Staple* v. *Haydon*, [1ſt. reſolution] where the Court held, "That a "repleader is to be awarded, when *ſuch* an iſ- "ſue is joined, as the Court, after trial there- "of, cannot give a judgment, as being im- "pertinent, and NOT *determining the right*: (I lay the ſtreſs on theſe words, "AND NOT *de- "termining the right*.")

Moore 867. the caſe of *Taſker* v. *Salter*, [*S. C.* with *Hobart* 112] the verdict paſſed upon a void iſſue: and the Court awarded a repleader. It was as no iſſue at all, and impertinent, as pleaded.

Here,

Here, it MIGHT *have been* pleaded *right*: but *as* there pleaded, it did not conclude; and therefore the Court could not determine the right.

So, the case in *Cro. Eliz.* 245. *Love* v. *Wotton* (a plea of the statute of usury, upon the usurious bond) there, as the statute was pleaded, the conclusion, "that the obligation was "taken by usury, &c." was immaterial: but the statute *might* have been pleaded right; and then it would have been a good defence: and *therefore* the Court awarded a repleader.

But there is a later case, (and the Courts have been more liberal of late years, in their determinations, and have more endeavoured to attend to the *real justice* of the case, than formerly;) and this is the case of *Tryon* v. *Carter*, *M.* 8. *G.* 2. which is reported in 2 *Strange* 994. and is a very material case: "A bond conditioned for payment of money, "*on or before* 5th *December*. Plea of payment "*on* 5th *December*. Replication, issue, and "verdict for the plaintiff." This was holden to be an immaterial issue; and a *repleader* was therefore awarded: though it would have been conclusive, if found for the defendant; but did not conclude, when found for the plaintiff. Therefore (though that was a slip of the defendant) as it did not determine the question, a repleader was awarded.

The case that has been mentioned of *Rex* v. *Philips*. *M.* 7. *G.* 1. in *Strange* 394. is material, for the reason given by Ld. *Ch. J. Pratt*, for if the justification is such in point of matter and substance, as could not, if put into *any* form of words, be material with regard to the defendant by way of defence, it is in vain to

grant a repleader; it being to no purpose to do so, where the *case itself cannot be amended*, or would be at all material, if put in *any* shape whatsoever: which was that case; for it amounted to a confession of the usurpation, as was there holden. And if it did, then he very rightly said, "that *if* the Court should "grant a repleader, the defendant *could not* "*mend* his case; for the plea would stand; "and after the formality of a demurrer, the "Court must give judgment upon the good-"ness or badness of it."

And Lord Chief Justice *Pratt* went on, and compared it to an ill justification in trespass, (where *no* form of words would have made it a defence;) and therefore was of opinion, that as the plea was ill, and contained no title to the franchise, the Court might give judgment upon it, as confessing an usurpation [Vide 1 *Strange* 398.]

Now *here*, supposing (as I said before) the swearing to be the *only* issue; is it not a question totally *inconclusive*, "whether he was, or "was not, sworn before THESE persons?" "Does it at all *conclude* to the real QUESTION?" Is not this, manifestly, a slip? Does it not *appear* that this plea * COULD *have been mended*? Certainly it COULD; *viz.* by pleading the swearing-in to have been *agreeable to the statute of* 11 *G.* 1. [*c.* 4. § 4. which directs it to be before the presiding officer.] Therefore, the REAL *justice* of the case is, that this *slip* should *not* be fatal *for ever*.

* N. B. This plea seems to have been good in form; but insufficient as to fact. See Fortescue's distinction in 1 Strange 398.

This is a franchise of great importance. It is so, in *itself*: and, besides, the rights and privileges of *many other* persons do depend upon it. And these writs of *mandamus* issuing

pursuant

pursuant to this act, were intended for the *settling* and *preserving* of corporations.

If this was the *single* issue, I think they would be *clearly intitled* in this case, to a *repleader*. Yet

Secondly—It is objected, "that here are "*many other issues, all found for the Crown*, as "well as this."

But the issue just now spoken of, as immaterial, and void, is an issue taken upon an essential part of an *entire* defence; for the defence here pleaded by the defendant is *one entire* defence: notwithstanding that the Crown is at liberty to take distinct issues upon the distinct *parts* of it. And therefore it would be absurd and inconsistent, that the finding against the defendant upon the *other* issues, the other *parts* of *one entire* defence, should stand; in case we should grant a repleader upon, or an amendment of *this* part: for if that should be permitted, the finding would still be *against* the title of the defendant, it being set up and pleaded as *one entire* title.

I agree, that if it appeared upon the whole record, "that the defendant was NOT duly "elected," it would be as Lord Chief Justice *Pratt* says, a vain and idle thing, to grant a repleader.

But if the rest of the issues are only *parts* of, and *dependent* upon the WHOLE TITLE; the same reason does not then hold.

The way to do *complete* justice indeed, is to let in the *one* side, without prejudicing the *other*.

If a *repleader* was to be granted (upon the supposition of this being the *only* issue) it must be * WITHOUT *costs*. But as this was a mistake of the defendant; (in which the prosecutor was not

* V. 6 Mod. 2. 5th point, accord.

not to blame) we ought to do the moſt complete juſtice we can, between both.

My Lord *Chief Baron* was right in his opinion, " that he could not admit proof *dif-* " *ferent* from the iſſue joined;" and alſo, " that this iſſue was *connected* with the " others."

If ſo, the verdicts were *without evidence*: and it was agreed, " that they were to be *with-* " *out* PREJUDICE:" therefore, ſuch verdicts ought to be ſet aſide, *as* without evidence; and not to conclude againſt the defendant, which *would be* a *prejudice*.

Therefore he propoſed to ſet aſide the whole verdicts, on *payment of coſts*; and to give the defendant leave to *amend* his plea.

If it had been upon a *demurrer* (which there might have been) the Court *would have given leave to* AMEND.

This ſeems to be the true way to come at juſtice; and what we therefore ought to do; for the true text is, " *boni judicis eſt, ampliare* " *juſtitiam*;" (not " *juriſdictionem*," as it has been often cited.)

This is what I would *wiſh* to do, if we *can* do it.

Mr. Juſtice DENISON.—Formerly verdicts were not uſed to be ſet aſide; and therefore, at that time, repleaders uſed very commonly to be granted. But they have been leſs uſual of late, ſince the practice of ſetting aſide verdicts has prevailed.

On repleaders, the iſſue was conſidered as void, and the verdict too; and conſequently, the judgment was, " *to replead*."

An information in nature of a *quo warranto* does not differ from *other* caſes.

Here

Here is an *entire plea*; the replication *separates* it, and takes iſſue on different *parts* of it. The replication *ought* to have *demurred* to this *immaterial* part of the plea: but *iſſue* is joined upon it: and there is a verdict upon it in the negative, *viz.* " that the defendant was " *not* ſo ſworn as he has pleaded." What can the *Court* do? The iſſue and verdict are *impertinent* and *void*. How then can the Court give *judgment*, when it *does not appear* whether the defendant had a right, or NOT? (I ſpeak now upon this ſingle iſſue *only.)*

Well then, if you ſet aſide any *part* of the verdict, you muſt ſet aſide the *whole*.

And this uſed, formerly, to be *one* iſſue.

I well remember that caſe of *Rex* v. *Philips*, *M.* 7 *G.* 1. it went upon an uſage to hold over. The point was, whether a repleader ſhould be granted, when the caſe could not be varied: and it was holden that that would have been vain and idle. On the contrary, it was ſaid that it would be a different thing, if the caſe could have been *mended* upon a repleader. I do not doubt but that there were great numbers of *other* iſſues in that caſe, as well as in this; and yet a repleader *would have been there granted* if the caſe could have been *mended* on the uſage.

The *whole* muſt be ſet aſide, *if part* is ſet aſide.

It is ſaid, " that this is a DEFECTIVE *title*." But it is no *title at all*: it is *only one link* of the whole chain.

I think we may ſet aſide the *whole* verdict upon *one* of the iſſues being void. And this is better than granting a *repleader*: upon which a writ of error may be brought, and may long

depend;

depend; which will be a much greater delay of juſtice.

Mr. *Juſtice* FORSTER.—This was an election under a *mandamus*, upon the ſtatute of 11 *G.* 1. in order to ſettle the peace of the burrough.

Here are twelve *iſſues* joined, *all* found for the king; and without evidence on any of them: ſo that none of them have been yet *really* tried.

It is agreed, "that in caſe of a *ſingle* iſſue "which doth not determine the right (which "way ſoever found) a repleader may be "granted."

The ninth iſſue in this caſe falls directly within this rule. It is totally immaterial to the queſtion of right.

If therefore the verdicts on the other iſſues, *upon which no evidence was given*, vary the caſe and ſtand in the way of a repleader, they ought to be all ſet aſide: or otherwiſe complete juſtice cannot be done.

And I think, as the caſe is circumſtanced, the agreement mentioned by the Lord Chief Baron *, "that the verdicts were to be without "prejudice in any future trial," may without a ſtrain be extended to any *future litigation* in the cauſe.

* Vide ante.

Lord MANSFIELD. I am now fully ſatisfied, by what my brethren have ſaid, that the *whole verdict* may be *ſet aſide* on *payment of coſts*, and with *liberty to amend the plea*.

But that muſt be on a particular motion. And I have no doubt but that we may do this, WITHOUT *the conſent* of the proſecutors.

Which motions were accordingly afterwards made by Mr. *Norton*, and granted, after a faint attempt by Mr. Serjeant *Poole* to ſhew cauſe,

and

and then to get coſts as between client and attorney; in both which attempts he was unſucceſsful: for the rules were both of them made abſolute, upon payment of common coſts; obliging the defendant, however, to take ſhort notice of trial.

By an expreſs agreement *the obligee of a bond to ſecure an annuity, may* waive the forfeiture *for nonpayment on the day, ſo as to be intitled to recover againſt the obligor, although he has been diſcharged under an inſolvent debtor's act, between the time of the forfeiture and the action brought.*

This caſe, which came before the Court at different times, and in various ſhapes, was finally diſpoſed of this day. As it was often cited in other caſes during the period I have undertaken to report, I thought it might be proper to ſtate the ſubſtance of the pleadings in the different proceedings, although I cannot give an account of the arguments of the counſel, and the Court, on the principal motion, from my own notes, having been abſent when it came on.

Webſter v. Banniſter, E. 20 G. 3. B. R. Doug. 378.

The caſe was an action of debt on a bond—*Plea*, that the plaintiff ought not to have any execution *againſt the perſon, or perſonal eſtate, of the defendant, except money in the funds, or money lent upon real ſecurity only* *; becauſe he ſays that the debt in the declaration mentioned was contracted or due before the 22d of *January* 1776, mentioned in a certain act of parliament, intituled, "An Act for the relief "of Inſolvent Debtors, &c." (16 *G.* 3. *cap.* 8.) and that he was, before the 1ſt of *January* 1776,

* 16 G. 3. cap. 38. § 41.

1776, arrested, and in actual custody; that he surrendered himself in discharge of his bail, and was thereupon committed a prisoner to the prison of the *King's Bench* before the 26th of *June* 1776, and was afterwards discharged, according to the form of the said act, at the quarter sessions for *Surry*, on the 29th of *July* 1776, and this he is ready to verify, wherefore he prays judgment if the plaintiff ought to have any execution against his person or personal estate, except money in the funds, or money lent upon real security only. The *replication* stated and made *profert* of the condition of the bond—which was for the payment of an annuity of £. 30. a year by the defendant and another obligor, to the plaintiff, in quarterly payments, on the 11th of *January*, of *April*, of *July*, and of *October*; the first payment to be made on the 11th of *January* 1772.—The replication then set forth, That after the 22d of *January* in the plea mentioned, and before the exhibiting the bill of the plaintiff, to wit, on the 11th of *July* 1776, £. 7. 10 *s.* for one quarter, and so other quarterly payments, on the 11th of *October* 1776, the 11th of *January* 1777, and the 11th of *April* 1777, became due; and that the defendant hath not paid them, or any part thereof, on those respective days, or at any other time, but the whole remained due; "by reason of which premises the said writing obligatory in the declaration mentioned *became forfeited*, and the debt and action accrued *after* the 22d of *January* 1776, in the plea mentioned," and so concluded with a verification. After this replication, there was an *entry of judgment* on the record, for want of a plea in bar to the action,

tion, but with ſtay of execution againſt the perſon and perſonal eſtate, except, &c. until the plea depending between the parties in that behalf ſhould be determined.—*Rejoinder*, That before the ſaid 22d of *January* 1776, to wit, on the 11th of *January* 1776, £. 7. 10 *s.* for one quarter of the annuity became due, and was not paid then, nor at any time ſince, but ſtill remained due, whereby the bond was *forfeited*, and the ſaid debt, by virtue thereof, accrued to the plaintiff before the ſaid 22d of *January* 1776.—*Surrejoinder*, That true it was, that £. 7. 10 *s.* for one quarter became due on the 11th of *January* 1776; but that the plaintiff afterwards, at the inſtance and requeſt of the defendant, *agreed* to give him day of payment of the ſaid £. 7. 10 *s.* until a future day, to wit, till *April* following, and that, on the 18th of *April*, the ſaid £. 7. 10 *s.* was duly paid, and that at the time when the plaintiff ſo gave day of payment, he did, at the inſtance of the defendant, *waive* and relinquiſh any forfeiture of the bond, which had accrued, or might accrue to him by reaſon of the nonpayment according to the condition, and acquitted and diſcharged the defendant from ſuch forfeiture, and all and every debt and debts due thereby; and the plaintiff further ſays, that the defendant, *by reaſon of the premiſes, was acquitted and diſcharged from ſuch forfeiture and debts.*—*Rebutter*, By which (proteſting that the *ſurrejoinder* was not ſufficient in law, and proteſting alſo that the defendant never requeſted the plaintiff to give ſuch day of payment) the defendant ſays, that the £. 7. 10 *s.* in the ſurrejoinder mentioned, was not paid to the plaintiff in manner and form, &c.—Upon this *iſſue* was joined.

The

The cause was tried before Lord MANSFIELD, at the sittings for *Middlesex*, in *Easter Term* 18 *Geo.* 3. and a verdict being found for the plaintiff, a rule was obtained by the defendant for the plaintiff to shew cause why the judgment should not be arrested; which rule was afterwards enlarged to *M.* 19 *Geo.* 3. when the *Solicitor General* and *Bower* shewed cause; *Dunning* and *Baldwin* for the defendant.

The ground of the motion (as I have been well informed) was, that the bond being once forfeited, the debt became absolute, and could not be again made contingent by any waiver of the forfeiture, on the condition of payment at a future day; at least it continued absolute till the compliance with the condition, which was not till after the insolvency, therefore the fact of the compliance with the condition after the insolvency was immaterial, and the plaintiff should have demurred to the rebutter, instead of joining issue on an immaterial fact. That the Court therefore ought to award a *repleader*.

On the other side it was insisted, that an obligee might waive the forfeiture, and thereby prevent the debt from becoming absolute even at law, especially since the statute of 4 and 5 *Anne, cap.* 18. The issue therefore was not immaterial, because the debt was to be considered as contingent or not at the time of the insolvency, according as the condition was or was not afterwards complied with. Or if the issue was immaterial, that was no reason why the plaintiff might not have judgment, provided enough appeared to intitle him to it on any part of the record; for, in such case, all that followed would be rejected (a), and here the conditional waiver appeared in the sur-rejoinder

(a) For this they cited 8 Co.

rejoinder and was not denied, and the debt was to be looked upon as contingent till a breach of the condition, and therefore was so at the time of the insolvency. 120. Ib. 122. 9 Co 110. Hob. 56. Salk. 173.

BULLER, *Justice*, asked if it was not a rule never to grant a *repleader* when the issue is found against the party tendering it. He said he thought it was, and that he could find no case of any exception to it.

The rule was discharged.

The defendant, when he was arrested in this action, had applied to ASTON, *Justice*, and afterwards to the Court, to be discharged on filing common bail, and obtained a rule to shew cause, but which was afterwards discharged.

In *Michaelmas*, 19 *Geo*. 3. a writ of error was brought, but bail in error not being justified, *a capias ad satisfaciendum* issued in the ensuing term, the effect of which was prevented by a commission of bankruptcy against the defendant. The validity of the commission being afterwards disputed by the plaintiff, and another creditor who opposed the allowance of the certificate, the Chancellor directed an issue, which was not proceeded upon, and the plaintiff having brought a *scire facias* against the original bail, the defendant surrendered himself, and on a former day in this term, obtained a rule to shew cause why he should not be discharged out of custody.

This day, the *Solicitor-General* and *Bower* shewed cause;—*Dunning* and *Howorth* for the defendant.

The ground of the application now was, that although the defendant, by imprudently taking issue on an improper fact, had failed in his defence to the execution against his per-

ſon upon the pleadings, yet he was clearly intitled to be diſcharged under the inſolvent act. They produced an affidavit denying that there had been an agreement to waive the forfeiture, and ſaid that no ſuch agreement had been proved at the trial, and, if iſſue had been taken on that fact, it muſt have been found for the defendant. The penalty therefore was a debt due at the time of the diſcharge under the act, and conſequently he was no longer anſwerable for it, with his perſon.

On the other hand, it was inſiſted, that if there was any miſtake in the pleadings, it was the defendant's own fault, and he had never moved for leave to amend. Beſides, they ſaid, (which was not contradicted on the other ſide) that it appeared at the trial, that a note had been given to the plaintiff for the payment both of the quarter due on the 11th of *January* 1776, and of that which was to become due on the next quarter day, and that the plaintiff, by taking this note, muſt be conſidered as having agreed to give further day of payment.

Lord MANSFIELD ſaid, he thought the note would have been evidence of ſuch an agreement, if iſſue had been joined on that fact, and that there was no doubt but the party might waive the forfeiture, and accept what he was equitably intitled to.

BULLER, *Juſtice*, abſent.

The rule diſcharged.

Dougl. 381. 2. Upon ſubſequent proceedings in *B.R.* in this cauſe, Lord MANSFIELD ſaid, that there was no doubt but the party might *waive* the *forfeiture*, and accept what he was equitably intitled to.

A motion

A motion may be made in arrest of judgment, after a rule for a new trial has been discharged, and at any time before judgment is entered up.

Taylor v. Whitehead, Trin. 21 G. 3. B. R. Doug. 716. Thursday 28th June.

It is not a good justification in trespass, that the defendant hath a right of way over part of the plaintiff's land, and that he had gone upon the adjoining land, because the way was impassable from being overflowed by a river.

Trespass for breaking and entering the close of the plaintiff, at the parish of *Otley*, in *Yorkshire*. The defendant pleaded; 1. The general issue; 2. A right of way, by prescription, through a lane of the plaintiff's contiguous to the *locus in quo*, to *Otley* Bridge on the river *Wharfe*; *that the tenants and occupiers of* THE LOCUS IN QUO *were, from time whereof, &c. by reason of their tenure, bound to repair the lane, and the banks thereof next the river*; that, at the several times when, &c. the lane was out of repair, and overflowed with water, so that the defendant could not use the way without imminent danger of the loss of his life and goods; and that he *necessarily* went into, through, and over, the *locus in quo*, as near to his said way as he possibly could, as it was lawful for him to do for the cause aforesaid; 3. That the *locus*, &c. lay contiguous to a lane of the plaintiff's, and that the said lane was adjoining to the river *Wharfe*; that the defendant had a right of way by prescription, through and over the lane; and, that because the lane and way were *overflowed with water from the said river* so much that the defendant *could not* at the several times, &c. *pass or repass*, he did *necessarily* go out of the said way, as near to the said way as he possibly could, into, through, and over, &c.

The plaintiff having traversed the prescription to repair laid in the first special plea, and the right of way laid in the last, the cause

came on to be tried before Lord LOUGHBOROUGH, at the summer assizes for *Yorkshire*, 1780; and the jury found for the plaintiff on the general issue and the first special plea, and for the defendant on the last.

(a) Thursday 9th Nov. 1780.

In Michaelmas term (a), a rule was obtained to shew cause why there should not be a new trial on the issue found for the defendant, as having been found against evidence, which rule was, upon argument discharged (b).

(b) Friday 24th Nov. 1780.

Afterwards, *Fearnly* obtained a rule to shew cause why the plaintiff should not be at liberty to enter up judgment on *that* issue, as well as the others, notwithstanding the finding of the jury, on the ground, that in point of law, although the defendant had the right of way through the plaintiff's close, he was not intitled to go upon the adjoining land of the plaintiff, when the way was out of repair.

On *Saturday*, the 3d of *February*, cause was to have been shewn against this rule, and *Lee* objected, that it had been applied for too late, for that it was in the nature of a motion in arrest of judgment; and, he said he had always understood the practice to be, that such a motion could not be made after a new trial had been moved for, unless the court, upon granting the rule for a new trial, should have given leave, if that should be discharged, to follow it by a motion in arrest of judgment. It seemed, he said, very unreasonable, that a party should be permitted to avail himself in so late a stage of the cause, of an objection that might have been taken in the first instance, by a demurrer to the plea, by which mode of proceeding, if the objection was founded in law, all the expence and vexation of a trial, and the motion

to

to set aside the verdict, would have been avoided. In answer to this, it was observed by *Dunning*, that it would be extremely absurd if an objection should be stated to the court, and they should be convinced that the party had not, by law, a right to judgment in his favour, that they should yet be necessitated, by any rule of practice, to pronounce an erroneous judgment in his favour, and so force the other party to bring a writ of error.

After some consideration, and conference with the master, the Court declared their opinion, that a motion in arrest of judgment might be made at any time before judgment was entered up, and that the present motion, being of the same nature, was not too late.

It now appeared, that the officer, by mistake, had entered a verdict for the defendant on all the issues; upon which it became necessary for the plaintiff's counsel, to move for a rule to shew cause why the *postea* should not be amended from the Judge's notes, agreeably to the finding of the jury, and that the rule then before the Court should, in the mean time, be enlarged.

The *postea* was afterwards amended, and, this day, the question on the validity of the last plea was argued.

Lee, *Davenport*, and *Wood*, for the defendant. They argued as follows: It is clear law, established by a number of cases, particularly that of *Absor* v. *French* in *Shower* (a), and *Henn*'s case (b), that, where a common highway is out of repair, by the overflowing of a river, or any other cause, passengers have a right to go upon the adjacent ground. So, if the water impairs the banks of a navigable river, (which indeed is considered as a high-way)

(a) B. R. M. 30 Car. 2. 2 Show. 28. S. C. Lev. 234.

(b) 8 Car. 1. Sir W. Jones, 2[illegible]

way) it is juſtifiable to go upon the neareſt part of the field next adjoining (c). No caſes are to be found upon the queſtion as to private ways; but there are determinations, the principle of which is, that, where it becomes impoſſible for a perſon to exerciſe his right without a treſpaſs on the ſoil of another, the law will *excuſe* the treſpaſs. Thus in *Dike* and *Dunſtan*'s caſe (a), it is ſtated (1) from the year-book of 6 *Ed.* 4. "That, if a man is to "lop his tree, and *he cannot do it unleſs it fall* "*upon the land of another*, then he may well "juſtify the felling it upon the other's land, "becauſe, otherwiſe, he could not lop it all." So in the caſe of *Miller* v. *Faudrye*, reported in *Popham* (b), "a man may juſtify chaſing "ſheep with a dog upon another man's "ground, if he cannot otherwiſe drive them "off his own." And in that caſe, there is one cited from 22 *Ed.* 4. 8. where it was held, "that, for neceſſity, a man who plows may "turn his plow on the land of another."— (BULLER, *Juſtice*, "There a *cuſtom* was laid") —And another from 8 *Ed.* 4. where it was laid down, "that if a tree grow in a hedge, "and the fruit fall into another's land, the "owner may go upon the land and fetch it." Theſe are all treſpaſſes occaſioned, as in the preſent caſe, by the unavoidable interruption of the exerciſe of private rights in the regular way. It is of no conſequence, upon this iſſue, who is bound to repair the road, becauſe the juſtification is not that the road was out of repair, and ought to be repaired by the plaintiff, but that, by the overflowing of the river, it was *impoſſible* for the defendant to paſs along the way, and therefore, he *neceſſarily* went out of it. If the queſtion who ought to repair is ſaid to be the material

(c) Young v. —— N. P. before Lord Holt, 1 Lord Raym. 725.

(a) B. R. M. 28 & 29 El. God. 4. 52.

(1) (By counſel.)

(b) B. R. E. 2 Car. 1. Poph. 161. —But that part of the reports is not by Popham.

terial part of the caſe, and that the iſſue tried on the ſecond ſpecial plea was immaterial, the motion ought to have been for a *repleader*, but as the plaintiff took the iſſue, the Court will not grant a *repleader* on his application (c). Suppoſing it not to be true in all caſes, that a perſon having a private way over the land of another, may, when the way is impaſſable, juſtify going on the adjoining ground; yet, ſurely, he may, where the land over which the way is, and the adjoining land, both belong to the ſame perſon. He, or thoſe under whom he claims, having granted a right of way over his eſtate, if the uſual tract becomes impaſſable, the right continues, and muſt be exerciſed on the neighbouring ground belonging to the grantor.

(c) Vide ante, Webſter v. Baniſter.

Lord MANSFIELD mentioned that *Blackſtone*, in his Commentaries, expreſſes an opinion that the law of *England* correſponds with the *Roman* law, on this point, extending the right of going on the adjoining ground when a road is out of repair, to private as well as public ways (a), and that *Comyns* in his *Digeſt*, ſeems to have entertained the ſame opinion (b).

(a) 3 Bl. Com. p 36.

(b) Com. Dig. tit. Chimin. D. 6.

Walker, Serjeant, for the plaintiff, inſiſted, that, by the common law, the *grantee* of a private way is bound to repair, unleſs there is an expreſs ſtipulation for the grantor to do it. This principle, he ſaid, was clearly deducible from the ultimate determination in the caſe of *Pomfrett* v. *Ricroft* (c), where one having granted the uſe of a pump, for a term, to another, and the pump having fallen into diſrepair, the grantee brought his action againſt the grantor, and, upon demurrer, the court of *King*'s *Bench* held (three judges againſt TWIS-

(c) B. R. M. 21 Car. 2. 1 Saund. 321.

DEN.) that it well lay, for that the grantor was bound to repair, but, upon a writ of error to the *Exchequer Chamber*, their decision was unanimously reversed. Now, on this record, he said, it was expressly found, on the first special plea, that the plaintiff was not bound to repair; and by the second, no custom or duty for him to repair was alledged. The defendant, therefore, must be considered as bound to repair in this case, and, if the road had become impassable by his neglecting to guard against the overflowing of the river, by keeping up the banks, it was his own fault, and he could not, on that account, be intitled to trespass on the neighbouring ground.

The Court stopped *Fearnly*, who was to have argued on the same side.

Lord MANSFIELD.—The question is upon the grant of this way. Now it is not laid to be a grant of a way, generally, over the land; but of a precise specific way. The grantor says, you may go in this particular line, but I do not give you a right to go either on the right, or left.—I entirely agree with my brother *Walker*, that, by the common law, he who has the use of a thing ought to repair it. The grantor *may* bind himself; but here, he has not done it. He has not undertaken to provide against the overflowing of the river; and, for ought that appears, *that* may have happened by the neglect of the defendant. Highways are governed by a different principle; they are for the public service, and if the usual tract is impassable, it is for the general good that people should be intitled to pass in another line.

WILLES and ASHHURST, *Justices*, of the same opinion.

Buller, *Justice*.—If this had been a way of necessity, the question would have required consideration, but it is not so pleaded. It does not appear that the defendant had no other road. There can be no ground for a *repleader*; for the plea is substantially bad; there is no fact alledged in it which could serve any purpose to deny, or go to issue upon.

The rule made absolute.

One *information* only, *may, by leave of the Court, be exhibited under the* Irish *statute* 19 Geo. 2. c. 2. sect. 4. *against* different *persons, and against the* same *persons, for usurping* different *franchises: and there is not any necessity to state such leave upon the record.*

This was a writ of error from a judgment of the Court of *King*'s *Bench* in *Ireland*, in *quo warranto*, against *Alexander Symmers*, *James Brown*, *George Staunton*, *Franklin Kirby*, *Abraham Marshall*, and *Thomas Grubb*; to shew by what authority they claimed to exercise the privileges and franchises of *freemen*, *free-burgesses*, and *common-council-men* of the town and borough of *Galway*.

Symmers & al' v Regem in error, M. 17 Geo. 3. B. R. Cowp. 489. Error from judgment of B. R. in Ireland, in quo warranto, against corporators of Galway.

The information set forth, that the borough of *Galway* is a town and borough incorporated by the name of the Mayor, Sheriffs, Free-burgesses, and Commonalty of the town and county of the town of *Galway*, and that a common-council is a constituent part of the said corporation. That the mayor, sheriffs, recorder, town-clerk, and all other officers of the said town of *Galway*, are to be elected and chosen only by the *mayor*, *sheriffs*, and *common-council* of the said town. And that the six defendants

fendants have used and exercised the franchises of freemen, free-burgesses, and common-council-men, without any lawful authority whatsoever.

Plea. The defendants by way of plea set forth, that the town and borough of *Galway* is, and from time immemorial hath been an ancient town and borough; and that the mayor, sheriffs, free-burgesses, and commonalty thereof, at the time of granting of the letters patent hereinafter mentioned, was a body corporate in deed, fact, and name; and that from time immemorial there was and yet is a *commonalty* consisting of an indefinite number of freemen, and also an indefinite number of free-burgesses; and also a common-council, consisting of an indefinite number of members duly elected, admitted, and sworn into the places or offices of common-council. That the sheriffs for the time being have been members of the said common-council, and also of a tholsell or general assembly of the said town; and say, that the mayor, sheriffs, recorder, town-clerk, and all other officers of the said town of *Galway*, have been, and are for the future to be elected and chosen only by the mayor, sheriffs, and common-council present, on the days whereon such elections were usually made.

That from time immemorial the custom hath been, that the *mayor* or other the chief officer and *common-council* of the said town for the time being, or *the greatest number* of the *said common-council present*, did and might, being duly assembled from time to time, *elect* such other discreet persons, not disqualified by any law in being, *members* of the said *common-council*. That from time immemorial the *electing* of any person or persons to be *freemen*

or

or free-burgesses, shall be by the said *tholsell* or *general assembly*. That by certain rules, orders, and directions made and established by the lord-lieutenant and council of the realm of *Ireland*, on the 23d of *September* 1672, for the better regulating of the corporation of the town of *Galway*, and the electing of magistrates and officers there, in pursuance of the stat. 17 and 18 *Car*. 2. intituled, "An act for the explaining of some "doubts arising upon an act, intituled, An act "for the better executing of his Majesty gra- "cious declaration, for the settlement of his "kingdom of *Ireland*, and satisfaction of the "several interests of adventurers, soldiers, and "other his subjects there, and for making "some alterations of and additions unto the "said act; for the more speedy and effectual "settlement of the said kingdom," it is directed, "that no person or persons, that shall "be elected either mayor, recorder, sheriff, "treasurer, alderman, town-clerk, or one of "the common-council, shall be capable of "holding, &c. until he or they shall have "taken the *oath* of *supremacy* therein menti- "oned, and the *oath* of *allegiance* besides the "oaths usually taken upon the admission, &c. "and also an oath in the said rules prescribed, "commonly called the little oath. That *no* "*matter* or thing in anywise relating to the af- "fairs of the said town, shall be *propounded* "or debated in the *tholsell*, or any general as- "sembly of the said town, *until* the same shall "have *first passed* the *common-council* of the "said town." And it is further ordered, "That all foreigners, strangers, and aliens, "as well others as Protestants, who are or shall "be merchants, traders, artisans, artificers,

"seamen,

feamen, or otherwife fkilled in any myftery, " craft or trade, who were then *refiding* and " inhabiting within the faid town of *Galway*, " or who fhould at any time hereafter come " into the faid town of *Galway*, with *intent* and refolution to *inhabit* and *refide*, upon payment down or tender of 20*s*. by way of fine, unto the chief magiftrate or magiftrates, " and common-council, or other perfons au- " thorized to admit and make freemen, be " admitted freemen *during his* or their *refi-* " *dence* for the moft part, and no *longer*." That King *Charles* the 2d. by his letters patent the 14th of *Auguft*, in the 29th year of his reign, did grant, " That the faid town of " *Galway*, and all caftles lying within the " fpace of two miles from every part of the " faid town of *Galway*, be one entire county " of itfelf: and that there fhould be for ever " thereafter, one new body corporate and po- " litic in deed and name, confifting of one " mayor, two fheriffs and free-burgeffes, and " commonalty, by the name of the mayor, " fheriffs, free-burgeffes, and commonalty of " the faid town and county of the town of " *Galway*;" and did thereby make certain perfons particularly named in the faid letters patent, to be free-burgeffes: and grant, " that " the faid perfons fo particularly named, and " made free-burgeffes, as alfo their fucceffors, " and likewife all and every fuch perfon and " perfons as fhould be of the common-council " of the faid town, *before* they be *admited* into " their refpective offices, places, or employ- " ments, *fhould take* as well the faid herein- " before mentioned *oaths of fupremacy and al-* " *legiance*, and the oath commonly called the " *little oath*, and alfo the *oaths theretofore ufu-*

" *ally*

"*ally taken*, for the due execution of the ſaid "places and offices; the *ſaid ſeveral oaths* to "be *adminiſtered* by the *mayor* or recorder, "and *two of the free-burgeſſes* of the ſaid "town:" which letters patent the then mayor, ſheriffs, burgeſſes, and commonalty accepted of. That by an act of parliament made in the 4th year of the reign of *George* 1ſt. intituled, "An act for the better regulating the "town of *Galway*, and for the ſtrengthening "the Proteſtant intereſt therein," it is enacted, "that no perſon ſhall be *elected mayor* or "ſheriffs, or common-council-men, who ſhall "not be an *inhabitant* or inhabitants within "the ſaid town and liberties thereof, at the "time of being elected into any of the ſaid "offices, reſpectively; and that hath or have "not been reſident for the ſpace of one whole "year before ſuch election; and that *all per-"ſons* who profeſs themſelves of any *trade*, "myſtery, or handicraft, that do or ſhall come "to *reſide* in the ſaid town of *Galway*, in or-"der to follow their reſpective trades, *ſhall "and are hereby declared to be free* of the ſaid "town and corporation, and alſo of that com-"pany or corporation to which their reſpec-"tive trades belong, *without paying any thing "for ſuch freedom*; and ſhall continue free-"men of ſuch company or corporation, *as long as they dwell* in the ſaid town, and *no longer*: PROVIDED, that no perſons are to have the benefit of their freedoms as afore-"ſaid, unleſs they have been profeſſed *Pro-"teſtants* for *ſeven* years, or upwards, next *be-"fore* their *demanding* their *freedoms*, purſuant "to this act; and ſhall alſo take the uſual "*oaths* of *freemen*; and alſo *the oaths of alle-"giance, and ſupremacy, and abjuration*: and

"make

make and ſubſcribe the *declaration againſt tranſubſtantiation, before the mayor of the* town, who is required to adminiſter the " ſame."

The plea then ſet forth that Symmers, *Brown*, and *Staunton* were, on the 22d of *November* 1771, *duly elected* freemen and free-burgeſſes, their election and admiſſion having firſt paſſed the common-council, and been propounded in the *Tholſell*.—The defendants, *Marſhall* and *Grubb*, ſetting forth that they were *tradeſmen, Proteſtants for ſeven years*, and *reſidents* within the town, further pleaded, that on the 4th of *February* 1772, an aſſembly or meeting of the mayor and common-council was in due manner holden at the *Tholſell*, and that they then and there *offered to take the oaths* of allegiance, ſupremacy, and abjuration, and *demanded* from the mayor of the ſaid corporation and the *common-council* there aſſembled, their freedom, purſuant to the ſaid laſt-mentioned act of the 4th *Geo.* I. And thereupon the *electing and admitting* them the ſaid *Abraham Marſhall* and *Thomas Grubb*, to be freemen of the ſaid town, *&c. paſſed the ſaid common-council*. That afterwards, to wit, the 5th day of *February* 1772, a *tholſell* or general aſſembly was in due manner held at the *Tholſell*, and then and there the *electing* and *admitting* them the ſaid *Abraham Marſhall* and *Thomas Grubb* to be freemen was *propounded*, and they were *then and there* in *due manner elected* by the ſaid *tholſell, freemen* of the ſaid town and corporation. *All* the defendants further pleaded, that they were in due manner elected into the reſpective offices of free-burgeſſes and common-council-men, and that being ſo elected into the offices of freemen,

free-

free-burgesses, and common-council-men, they did before they were admitted, take the oaths of allegiance, supremacy, and abjuration, *&c.* and all the oaths usually taken, *&c.* before the *mayor*, and *two free-burgesses*.—The *replication* took issue that the defendants were "*not elected* in *manner and form* aforesaid into the offices of *freemen*, free-burgesses, and common-council-men respectively." And at the trial all the issues were found for the Crown. The defendants, in support of their title, gave in evidence the corporation books, in which were contained entries of their respective elections.

On the part of the prosecutor, a witness was produced, who gave in evidence, out of the corporation book so produced by the defendants, the orders of elections of *nineteen* persons there named; and further gave in evidence, that upon the elections of the defendants in the common-council, on the 21st of *November* and 4th of *February*, several of the nineteen, to wit, *ten* on the 21st of *November*, and *twelve* on the 4th of *February*, who were freemen, free-burgesses, and common-council-men, and who had done several corporate acts, tendered their votes against the elections of the defendants. That the mayor rejected their votes; and that if they had been permitted to vote, that is to say, the ten on the 21st of *November*, and the twelve on the 4th of *February*, there would have been a majority against the respective elections of the defendants.

The counsel for the defendants then gave evidence of the *disfranchisement* of *all* the nineteen persons, before the time of the elections of the defendants, by producing the orders of disfranchisement in the same corporation book.

That

That thereupon the relator's counſel gave in evidence ſeveral orders out of the ſame book; by which it appeared that *fifteen* of the ſaid nineteen perſons had been *reſtored* in purſuance of peremptory writs of *mandamus*; which fifteen included the ten who had done corporate acts, and whoſe votes were refuſed on the 21ſt of *November*, and the twelve who had alſo done corporate acts, and whoſe votes were refuſed the 4th of *February*; but by the dates of the orders, the reſtoration of the fifteen appeared to have been *ſubſequent* to the *election* of the defendants.

Whereupon, and after the ſaid entries and alſo another entry had been read, the counſel for the defendants did object thereto. For that the ſaid *entries* of reſtoration in the ſaid book were not admiſſible evidence, without firſt producing the *mandamus's*, and returns, or *atteſted copies* thereof. But the juſtices over-ruled the objection, and did permit the ſaid matter to go to the jury as evidence of the reſtoration of the ſaid perſons without producing the writs, returns, or atteſted copies.

And thereupon the defendants counſel, to prove the ſaid iſſue, and that the defendants were duly elected, did produce, give in evidence, and read the ſtat. 4 *Geo.* 1. by the defendants particularly pleaded; and offered to give in evidence, that the ſaid ſeveral perſons (the fifteen who had tendered their votes and done corporate acts) were not inhabitants, *&c.* and reſident for one whole year before their reſpective elections; and did inſiſt that ſuch evidence ought to go to the jury, which the juſtices refuſed to admit. Upon which, the defendants counſel tendered a bill of exceptions to *Godfrey Lill*, Eſq. the judge of aſſize, which he ſealed.

The

The bill of exceptions having been returned into the Court of *King's Bench* in *Ireland* as part of the record; the Judges, after hearing arguments upon it, gave judgment of *ouster* against all the defendants; whereupon this writ of error was brought.

Mr. BULLER, for the plaintiffs in error, argued, that this information was bad; 1ſt. Becauſe filed againſt *ſix* different perſons, for uſurping *three* different offices. That ſuch an information would clearly have been bad at common law. In 2 *Strange*, 921. *ſix* were indicted for perjury, and judgment was arreſted ſolely on that ground. In 1 *Str*. 623. an indictment againſt ſix for exerciſing a trade, was quaſhed. In *Rex* verſus *Tucker et al'*. *Paſch*. 7 *Geo*. 3. *B*. *R*. 4 *Burr*. 2046. an indictment againſt *eleven* was quaſhed for the ſame cauſe. 2 *Barnard*. 24. So in *quo warranto*, ſeveral cannot be joined. *Rex* verſus *Jarvis* and *Clarkſon*, *Tr*. 10 *Geo*. 2. M. S. If not good at common law, the next queſtion is, whether it is aided by the *Iriſh* ſtatute 19 *Geo*. 2. c. 12. which directs, "that it ſhall be lawful for the "proper officer of the court, to exhibit one or "more informations againſt any perſon or "perſons uſurping offices, and to proceed "thereon in ſuch manner as is uſual in *quo* "*warranto*; and if it appears that divers "rights may be determined on one informa-"tion, one ſhall be ſufficient to try them." This ſtatute muſt be conſtrued with ſome reſtriction; otherwiſe the words themſelves would carry a meaning nobody could contend for; and authoriſe an information againſt the mayor of one corporation, the alderman of another, and the freemen of a third. The rue conſtruction muſt be, to confine it to caſes

where the offices or franchises are in the *same corporation*, and *ejusdem generis*. But here, the offices are of a *different nature*. Again, the statute gives no authority to join *different claims*, but speaks merely of joining *different persons*. Therefore, if this information had been filed against *one* defendant only, and had charged him, as in this case, with usurping the *three* different offices of freeman, free-burgess, and common-council-man, it would have been equally bad. There is no precedent of such an information, and the practice is universally against it. But suppose this were a case within the statute, and that the Court could give leave to join different claims; it does not appear, that any such leave was given, or any discretion exercised by the Court on the occasion. Therefore, it must be taken to be an information at common law. Where several pleas are pleaded, it is the practice to state, that they are pleaded by leave of the court: and so it should have been done here.

2dly, As to the issues and the judgment on them, *two* of the defendants, *Marshall* and *Grubb*, have stated their right to the offices of freemen in virtue of their being *resident Protestant traders* within the stat. 4 *Geo.* 1. which enacts, that, in that case, they shall have a right to be admitted without *paying a fine*. The right they state therefore is a right under this act of parliament; and not by virtue of an election. The two issues joined on these pleas is, that they are *not elected*: at the same time, their true title is not denied; and yet judgment of *ouster* is given against them. Whereas the issue joined being an *immaterial issue*, and not founded on any fact in the plea, the judgment ought to have been for them.

3dly,

3dly, The judgment of the court below is *founded* on the *bill of exceptions*, of which they had no jurisdiction. *Davenport* versus *Tyrrel*, *Trin.* 9 *Geo.* 3. *B. R.** So that the judgment is on issues not disputed; against titles admitted; and founded on what the court has no jurisdiction of.

* Since reported in 1 Black. Rep. 675.

Lastly, On the bill of exceptions itself, *four* different questions arise. 1*st.* Whether the persons whose votes were rejected at the elections of the defendants, were even voters *de facto*, at the time of the election. 2*dly*, Whether the evidence given by the prosecutor to prove them members *de facto*, was proper and admissible for that purpose. 3*dly*, Whether, if they were not freemen *de jure*, though they might be freemen *de facto*, it was not competent to the defendants, under the circumstances of this case, to prove at the trial that they were not so *de jure*. The 4*th* question is, if it were competent to them to do so, whether the evidence offered was proper and sufficient for that purpose.

As to the *first* question upon the face of the entry produced by the prosecutor to prove their admission, it appears that none of them were *actually* admitted, but only that there was an order they *should be admitted*: that is not an admission in any sense; and so it was held in *Rex* versus *Lisle*, *Andrews* 163. But it is infinitely stronger here, because the order was not made by the *general assembly*, but by the *common-council* only, who have no right to elect either freemen or free-burgesses. Another reason against their being members *de facto* is, that they had been *removed* before the election of the defendants, and such removal was then in force. The evidence given of their being

restored was subsequent to the time of the election. The *mandamus's* could have no effect 'till they were actually restored; and the very application for the *mandamus's* is evidence of their being out of possession. During the intermediate time, therefore, they could not be officers *de facto*. If disfranchised, it was no longer necessary to summon them to meetings of the corporation; though it should afterwards appear they were illegally disfranchised. It was so decided in 10 *Mod.* 76 *. But less would do here; for if the Court should be of opinion, that while disfranchised (unless rightful members) they could not vote; the judge did wrong in not receiving evidence to prove they were not *de jure* members.

* Hil. 10 Ann. Queen v. Sutton.

The *second* question is, Whether the entries in the corporation books, of their being restored to the office of common-council-men, were proper and admissible, to prove them officers *de facto*. The entries of restoration were not voluntary acts of the corporation, but under the authority and compulsion of writs of *mandamus*. Therefore, the writs of *mandamus* themselves should have been produced, as being the best evidence: as in the case of inquisitions taken under a commission, the commission as well as the inquisition must be produced.

As to the *third* question, How far, and in what cases the right of the electors may be gone into on informations against the elected, as a *general* question, has never been decided. That a latent objection cannot be gone into, has been settled; but the reason in that case is not applicable to the present. Here, there was no surprise on the prosecutor. Rejecting evidence

evidence of this ſort does not tend to keep matters quiet; for if bad votes muſt be admitted, it is only introducing the elected into the corporation, for the ſake of turning them out again. If the ojection is notorious to the other party, it may be made; and here, the objection to the eleven voters in queſtion was a matter notorious to both parties: therefore, their right might be gone into. Where the elector has been ouſted by *quo warranto*, though the defendant was no party to the ſuit, and may be a ſtranger to it, yet the judgment is evidence againſt him; becauſe of the public notoriety. Here, the objection to theſe eleven perſons, was the point on which both parties agree the election muſt be decided. Both therefore were equally appriſed. If the legality of theſe voters could not be entered into on this information, a preſiding officer at an election can have no power of examining whether the votes are legal or not. But in all elections, particularly of members of parliament, the preſiding officer exerciſes his judgment, whether a vote is good or bad. If the preſiding officer has no right to judge, there can be no action for a falſe return. Beſides, in this caſe, the evidence reſpecting the right, was begun by the proſecutor himſelf; by entries to ſhew they were qualified and rightful members. If ſo, the plaintiffs ſurely have an equal right to rebut that evidence, and to prove they were not qualified. If, in ſuch caſes, evidence of the right is not to be gone into; by delaying the trial of ſome informations, and puſhing on the trial of others, bad members might be eſtabliſhed and rightful ones ouſted. For inſtance, ſuppoſe three claſſes of voters, elected in *Auguſt*, *September*, and *Oc-*

tober; the firſt not duly elected; the ſecond not duly elected without the votes of the firſt; the laſt elected by a majority, excluding thoſe in *Auguſt*. On an information againſt the laſt, they muſt be ouſted becauſe they cannot diſqualify the firſt ſet. Then, on an information againſt the ſecond ſet, they muſt be eſtabliſhed, and the proſecution fail; for the ſame reaſons; then on an information againſt the firſt ſet, and they ouſted; the conſequence would be, that the ſecond ſet, though not duly elected, would be eſtabliſhed, and the third ſet, though duly elected, would be ouſted.

The *remaining* queſtion is, Whether the evidence offered was proper to prove that the perſons rejected were not common-councilmen *de jure*. This depends on the ſtat. 4 *Geo.* 1. which is ſtill in force, and the law of the place: it enacts, "that no perſon ſhall be "elected, who is not reſident a twelvemonth "before." If ſo, there can be no doubt of the propriety of the evidence offered; for it was to prove they were not reſident a twelvemonth before.—Upon the whole, whether the iſſue, of "not elected" be conſidered as an iſſue of fact only, or of fact blended with law, the plaintiffs in error are equally intitled. For if an iſſue of fact only, then ten were not members *de facto*, having been removed; and the proſecutor's evidence ought not to have been received. If the iſſue is blended with law, and it was competent to the proſecutor to go into the right, it was equally competent to the defendants to diſprove what was given in evidence by the proſecutor. If it be merely a queſtion of fact, we had a majority at the poll. If of law, the evidence of the title of the electors muſt be received. Therefore,

ſore, in either caſe, the Judge did wrong; and conſequently the judgment ſhould be reverſed.

Mr. *Davenport contra.* As to the *firſt* objection that ſeveral perſons are included in one information, the ſtatute 19 *Geo.* 2. furniſhes a clear anſwer, by giving the court a diſcretion to join as many perſons as they pleaſe. And as to the objection that the leave of the court does not appear on the record: it never does appear; and there is no neceſſity it ſhould. *Secondly*, as to *ſeveral* claims being joined, it is ſaid, it would have been bad at common law: but the caſes quoted of ſeveral perſons joined in an indictment for perjury *, and for exerciſing a trade †, are not applicable. Six could hardly be guilty of the ſame perjury. But there is no caſe which ſays, one man ſhall not be called on, for uſurping different offices, in one information. The caſe in 2 *Barnardiſton* 25, ſays, " *two perſons* cannot be joined in one indict-" ment;" it does not ſay *ſeveral offences* cannot. But this act ſays, " By leave of the " court *different uſurpations* may be joined." There is a caſe of *Rex* verſus *Clendon*, in 2 *Str.* 870. where it was ſaid, " two could " not be joined in an indictment for an aſ-" ſault:" but that has been often over ruled. If there be no precedent, it muſt be reſolved on principles of law: and what principles of law ſays, the Crown cannot call on a man to ſhew why he exerciſes ſeveral franchiſes? It is more beneficial for the defendant, that his different claims ſhould be joined; and one expence only be incurred. In *Co. Entries* and *Raſtal's*, there are ſeveral precedents of informations, for uſurping different offices. *Co. Entries*, 527. tit.

* 2 Stra. 921.
† 1 Str. 62, 3. 4 Burr. 2046.

tit. *quo warranto*, for usurping *fourteen* different franchises. And in the Earl of *Shrewsbury*'s case, *ibid. sixteen* franchises are joined; and these in *quo warranto*; which is a stricter mode of proceeding than the information in *nature* of *quo warranto*, now substituted in its place. These cases occurred in the time of Lord *Coke*, and *Hobart*, attorney-general. It might as well be said, that goods sold, and work and labour done, shall not be joined. Therefore, the act of parliament is an answer to the first objection; and the principles of law to the second. The next objection goes to the *form* of the issue, with respect to *Marshall* and *Grubb*; who claim under the statute 4 *Geo.* 1. as resident traders. Now the right given by the statute, is a claim to be *admitted*, provided they are resident Protestant traders; but instead of shewing a title by *admission* under the act, they waive that, and shew a title by *election*, precisely in the same manner as the other defendants have done. Therefore the replication taking issue on such election is right.

Thirdly, As to the objection that the Court have proceeded on the bill of exceptions, of which they had no jurisdiction. If they had not, it is a mere *nullity*; and if the judgment be good independent of it, the Court will consider it as given on the verdict alone.

As to the fourth objection on the bill of exceptions, that the ten were not even voters *de facto*; 1st, because not *actually* admitted, and 2dly, because removed; if they were not actually admitted, the defendants themselves never were; for the entry of their admission is precisely in the same manner. As to their being removed, that of itself is an admission they

were

were once burgeſſes: but by whom is the removal? By the common-council *only*, who are but a *part* of the body; conſequently, had no right to remove them. With regard to the admiſſibility of the proſecutor's evidence to prove them voters *de facto*; if the defendants had a right to produce the entry they did, to diſprove their right by ſhewing their amotion, it was clearly competent to the Crown to ſhew they were reſtored by an entry in the ſame book, without producing the writs of *mandamus* themſelves. Written evidence muſt be all taken together; therefore the evidence was clearly admiſſible, and if ſo, the act of reſtoration, by relation back, makes them in from 1761, and puts them in the ſame ſituation as if they had never been out of poſſeſſion.—As to the 3d *point*, it is dangerous to attack *derivative* titles, by an objection to the *original* title. If the *electors* were *de facto* members, they ought not to have been rejected on the ground of a defect at the time of their own election; nor could the queſtion be gone into. There are but two ways of attacking the title of an elector *de facto*; the firſt is by information, which is the propereſt mode; becauſe the party beſt knows his own title. The other is by an iſſue introduced on the record, upon the title of the perſon whoſe right is meant to be queſtioned. A third way was attempted in the famous caſe of *Strode* verſus *Palmer*, *Lillie's Ent.* 248. by *notice* on the record, that particular votes would be objected to. But neither of theſe ſteps have been taken in the preſent caſe. Even judgment of *ouſter* is not concluſive; for if by colluſion, it may be controverted. *Rex* verſus *Hebden*, *Andr.* 388—392. But where there is no judgment of

ouſter,

ouster, no act of removal apparently tortious will do. In other cases, the court requires that notice should be given of the fact meant to be insisted on. *Tufton* versus *Nevison*, 2 *Ld. Raym.* 1354. As to the 4th objection, it was decided in *Comyns* 243. *Austin* versus *Osborn*, that a man may have a right to vote, though never admitted.

Lord MANSFIELD.—There are *three* objections made to this judgment, independent of the subject matter of the bill of exceptions. The *first* is, that this is an information against *different* persons; and against the *same* persons for *different usurpations*. As to its being against the *same* persons for *different usurpations*, I think what Mr. *Davenport* has said, and the cases he has cited are very strong to shew, that the information would have been good at common law: but if it would not have been good at common law, it is strongly within the statute 19 *Geo.* 2. c. 12. *sect.* 4. *a fortiori*, when the statute gives leave to exhibit one and the same information, if the court shall think fit, against *different* defendants for the *several* rights claimed, or set up by them respectively. As to the other part of this objection, that this is an information against *different* persons; the answer is, that the act of parliament gives a discretionary power to the court to grant one or more informations, according to the nature and circumstances of the case: and to suppose extravagant cases, or that the Court would be absurd enough to join two franchises in different corporations, is to suppose a case that cannot exist. The legislature trusts the court with the discretion of joining them; and upon an application for leave, the court goes into the nature of the question to be tried. In this case, nothing could be more proper, than to

join

join the ſeveral defendants and the reſpective franchiſes they claim, which are three. The right of election is exactly the ſame, the queſtion is the ſame, and the evidence the ſame. But then it is contended, that ſuppoſing this *ſubſtantially right*, it is *formally wrong*; becauſe it is not ſtated to be filed againſt the ſeveral perſons, and for the ſeveral offices they claim, by *leave of the court*. No ſuch thing is neceſſary; no information ever ſtates it to have been filed by leave of the court. The court gives the order, and the information is filed. But ſuch leave never appears on the record. Counſel cannot ſign an information without leave is firſt given: but it never appears on the pleadings; therefore, that objection is out of the caſe.

The next objection, independent of the bill of exceptions is, that *Marſhall* and *Grubb* claim to be freemen under the *act* of parliament, and not by *election*, and therefore, the iſſue as to them is an *immaterial* iſſue, being joined on the *election*. The anſwer to that is, the defendants themſelves have put it ſo; and call their admiſſion by the corporation, an election. They are not freemen *ipſo facto*, by the act of parliament; but they muſt ſhew they are ſo, by proving themſelves Proteſtants, reſident in the town of *Galway* for a year, antecedent to their being admitted, and that they have taken the oaths preſcribed. Therefore the defendants themſelves have led the proſecutor into the miſtake, if any, by calling their admiſſion an election. That objection, therefore, has no weight.

The next objection is, that the court below have given judgment, not only on the verdict, and what ariſes out of it, but have likewiſe

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gone into arguments on the bill of exceptions; and the judge before whom it was tried, appeared perſonally, and brought his bill of exceptions before the court of *B. R.* in *Ireland.* It certainly is ſo: the court has proceeded by miſtake on the bill of exceptions, and gone into arguments upon it. Till very lately, there was no bill of exceptions in *Ireland*, and they were at a loſs in this caſe how to proceed. The ſtatute giving the bill of exceptions, ſays, it ſhall be brought by the judge who tried the cauſe into the ſuperior court. It is ſo here: a bill of exceptions from the *C. B.* comes into this Court immediately; it goes from hence originally, to the lords in parliament. Where there is a bill of exceptions from the *B. R.* in *Ireland*, the judge muſt bring it into this Court. To eaſe him from that trouble in this caſe, a commiſſion iſſued to Lord *Annaly* to take the acknowledgment of his hand and ſeal. They were doubtful whether they ſhould not certify the tranſcript, as they do of all their other records.

But if the court of *B. R.* in *Ireland* had no juriſdiction upon the bill of exceptions, What is the conſequence? They have proceeded on good and bad grounds. Though this Court differs from them on the bad ground, it does not follow that they differ from them on the good. If there is a good ground, independent of the bill of exceptions, that is ſufficient. This Court cannot reverſe a right judgment, becauſe the court in *Ireland* has proceeded erroneouſly in reſpect of ſomething elſe which they ought not to have entered into.

Then we come to the merits of the ſubject matter of the bill of exceptions; and as to that, *four* queſtions have been made.

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The *first* question is, Whether the ten voters who offered their votes, and were rejected, ought to have been received. Upon this question the validity of the defendants election entirely depends.

The first objection that has been made against their right to be received, is, that they were not even voters *de facto*. This objection has been attempted to be supported on two grounds; 1st, because they were never admitted of the corporation, the order produced in evidence, being only that they *should* be admitted, and does not say they *were* admitted. But on the proceedings produced it appears, that for ten years they acted as burgesses; and *that* which was called an order of disfranchisement, considers them as burgesses. So the order for their restoration is evidence to be left to the jury, of their having been admitted; even supposing it rested on so nice a point, as whether it was made before, or after their admission.

The next ground is, that they had been *disfranchised*; that the disfranchisement was still in force, and their restoration not till *after* the election. As to this objection, a great deal depends upon the use of the word *disfranchisement*; otherwise it creates a confusion. But on looking into it, this is no disfranchisement, nor is there a pretence for calling it so: but it is doing that which the common-council had not the semblance of a right to do; taking upon themselves to judge of the validity of an election ten years before, and to declare it *null* and *void*, for want of a qualification at that time. The word "disfranchisement" signifies taking a franchise from a man for some reasonable cause; which they do not do, but only say they



never were common-council-men. What authority have the common-council to do that? None. It could be done only by information in the nature of a *quo warranto*. But suppose it had been a disfranchisement, how does it appear to the Court that the common-council have a right to disfranchise. It is incident to the corporation at large to disfranchise, but not to a select body. It does not follow that the select body who has a right to elect, has from thence a right to disfranchise. But the fact is, it is no disfranchisement at all.

The next objection is, that the *order of restoration*, as it appears by the corporation books, was not made till *after* the election, and that this order alone, is *not* the *best evidence*. As to that, the corporation books are clearly as good evidence to shew these persons were restored, as to shew they were disfranchised. It struck me at first, that the time of the restoration, and consequently the time of issuing the *mandamus*, which was not proved, might be material: that is, if the *mandamus* to restore the voters in question, was *before* the *election* of the defendants, and the order *actually* restoring them, was not till *after*; and to support their right, it had been necessary to make the order *relate back* to the *date* of the *mandamus*, the time of the writ issuing should have been shewn. But upon consideration, I think, that let the restoration come when it will, it *relates* to the *original right*. It would be so in the case of a probable ground of disfranchisement. But here, there is not a probable ground: there is no colour for a removal; the act of common-council was a mere nullity, and the restoration makes them in from the beginning.—Thus it stands as to their being voters *de facto*.

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The next queſtion is, being voters *de facto*, whether, on the trial of the reſpective rights of the ſeveral defendants, the elected, the rights of the voters to their corporate franchiſe can be gone into, without any notice on the record, or collaterally. It is true, that, in general, the perſon elected muſt take upon himſelf to ſupport the right and title of his electors: it is ſo in a variety of caſes. In the election of aldermen of the city of *London*, coroners, members of parliament, *&c.* all theſe are bound to ſupport the rights of their electors. But, for the ſake of juſtice and convenience, a diſtinction has been made in caſes where the right of election depends upon corporate franchiſes. There are qualifications to the exception, ſuch as have been ſtated by Mr. *Buller*. The general queſtion has never been fully ſetled, though it has been touched upon in many caſes. But this is ſetled; that no corporator is bound, by ſurpriſe, to go into the original qualification of any corporator in poſſeſſion, who voted for him at his election; eſpecially without notice. What would be the condition of theſe people? There are ten of them who, for ten years, have been quietly in poſſeſſion without any information, or the idea of an information being brought againſt them. How can the queſtion be gone into, with regard to their qualification, at ſuch a diſtance of time; more particularly as that qualification depends on their reſidence and inhabitancy for a year, previous to the time of their election?

ASTON, *Juſtice*. This has not the leaſt appearance of a disfranchiſement. Can a common-council-man declare the election of another common-council-man null and void? In general, a disfranchiſement muſt be the ac-

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of the whole body: and if a ſpecial power be delegated to a part of the body, it ought to be ſhewn. But no ſuch power appears in the common-council. Therefore I look upon their order, in this reſpect, as a mere nullity. As to the qualification of the electors, it is not neceſſary at preſent to decide whether their right could have been gone into; becauſe, if the mayor was bound to receive theſe votes, the election is clearly bad. As to the ſtat. 4 *Geo.* 1. that ſtatute gives a man only a *right* to the freedom of the town; and to complete his title, he muſt go before the mayor, take the oaths, and produce the other proofs required. The iſſue follows the words of the plea. Therefore I am at preſent ſatisfied, that the judgment entered, is the proper judgment to be entered up on the verdict; and the circumſtance of the court below having proceeded upon the bill of exceptions, ſhall not vitiate it.

Willes, *Juſtice.*—My only doubt is as to *Marſhall* and *Grubb*; for their right to be admitted freemen, is different from the others: and if they have performed the requiſites of the ſtat. 4 *Geo.* 1. they are intitled to be admitted, and are by the act declared to be free. Whether the ten are good voters or not, as at preſent adviſed, I think *Grubb* and *Marſhall* are good burgeſſes under the ſtatute.

Ashhurst, *Juſtice.*—I entirely concur, that if enough appears upon the whole of the record, to ſhew that the court of *B. R.* in *Ireland* have given a right judgment, we ought not to reverſe it: and I think the bill of exceptions makes no difference. The iſſue is taken in the

the ſame words as the plea, and the plea calls it an election.

Lord MANSFIELD. We will think of it as to this point, and give you our opinion; and if any thing more is neceſſary, we will let you know it.

Cur' adviſare vult.

The Court afterwards ſaid, they wiſhed this caſe to be argued again. Accordingly it was argued again in *Hilary* Term 1777, by Mr. *Dunning* for the plaintiffs in error, and by Mr. *Mansfield* for the Crown: but all the points were given up except two. 1ſt. Whether, at all events, the defendants *Grubb* and *Marſhall* were not intitled to judgment, their title under the *Galway* act not being denied or put in iſſue. 2dly. Whether the Judge below did not do wrong in rejecting the evidence offered, to ſhew that the perſons rejected by the returning-officer had not a right to vote.—After the argument, the Court delivered their opinion, as follows:

Lord MANSFIELD.—There are two queſtions, *firſt*, Whether, upon this record, judgment ought not to be given for the defendants *Grubb* and *Marſhall?* And, *ſecondly*, Whether the Judge below ought not to have gone into the ſeveral qualifications of the ſeveral voters, who voted as common-council-men, and whoſe titles he refuſed to enter into?

As to the firſt queſtion, enough appears upon the record to incline us to think, that *Grubb* and *Marſhall* really had a right to be freemen, if they had pleaded in a proper way: and if judgment of *ouſter* on this record were to bar them for ever of the benefit of that right, a reluctance would ariſe in the Court, from the general prejudice they have againſt any party

losing his right, by a mere defect in his form of pleading. If that were the case, another principle must be adhered to, which is, that in all questions concerning the rights of corporations, it is most desirable and necessary, that the law should be certain, not only in respect of the matter, but also in respect of the form and manner of all their proceedings.

But my mind, with regard to *Marshall* and *Grubb*, is considerably eased, by being of opinion, that the judgment of *ouster* on this record will not bar them, if they apply in a proper way: because they will then have a new title, not affected by the present judgment. It may happen, that persons might apply at one time under the act of parliament, when they had no title; and at the end of six months after they might have a very good one. If it should be so in respect of these two defendants, the question is still open.

This case, as it is now brought before the Court, is an information against the two defendants, to shew by what authority they claim the offices of freemen, free-burgesses, and common-council-men of the town and borough of *Galway*. As to the offices of *common-council-men* and *free-burgesses*, the qualification and mode of election depend intirely upon the *constitution of the borough*. As to the office of *freemen*, there are two modes of acquiring that right: the one, according to the constitution of the borough, by the election of the mayor, common-council, and freemen, in general assembly, agreeable to the rules of the borough and its charter: the other, by special act of parliament, which consists and is complicated of many facts. This latter gives a *right* only, not a *title*; because the qualifications of the claimants

claimants muſt be judged of. They are to be tradeſmen of certain trades mentioned; inhabitants within the borough for a year preceding; Proteſtants profeſſed for ſeven years; and then they are to apply for their freedom. The act therefore gives but a *qualification.* The mode of obtaining their freedom is by application to the mayor upon the facts before mentioned. The mayor, therefore, *ex officio*, is to judge whether they are qualified within the act or not; if they are, he muſt admit them; if not, he ſhould reject them; and if he ſwears any one in without a qualification, ſuch perſon may be *ouſted* by an information.

But theſe two modes of acquiring the freedom of this corporation are attended with different conſequences. The freemen elected according to the conſtitution of the borough, remain in poſſeſſion of their franchiſe *for life:* thoſe admitted under the act of parliament, continue ſo only during their actual *reſidence* in the town. It is neceſſary therefore to know which are choſen the one way, and which the other.

To the preſent information in nature of *quo warranto*, the two defendants have pleaded the *qualification* under the *act* of parliament. They certainly have pleaded that they deſired to be ſworn under the act of parliament: but then they join the title of common-council-men and the office of freemen in the ſame right, and they apply exactly the ſame words to each. They aver, that they were firſt propoſed by the common-council, purſuant to the new rules for regulating the town of *Galway* ſtated in the plea, which require that they ſhould be firſt approved of by the common-council, and

propounded to be elected at the *Tholsell*. But that is not necessary under the act of parliament 4 *G.* 1. Then they state that they were *duly elected*, and that being *so elected* into the office of freemen, free burgesses, and common-council-men respectively, they took the oaths before the *mayor* and *two burgesses*; which is the form in cases of election by the *constitution* of the borough. Here, therefore, they plainly rest their title on *election*, and go to issue on that title.

Upon this record it does not appear that they took any step to be made freemen by the act of parliament; therefore they have not shewn a complete title under the act of parliament: but rest their claim upon another title, upon which they have gone to issue, and which has been found against them. It is impossible therefore to give judgment for them.

The next, which is an objection of less difficulty, is, that the Judge below has refused to go into the qualification and capacity of several freemen and common-council-men who offered their votes. Let us state the objection as it is put, and examine it. The proposition is, that the Judge, on this information, should have done exactly what he ought to have done, if the title of these persons, who were common-council-men *de facto*, had actually been in question before him upon *quo warranto*. They were *de facto* members of the corporation, admitted, sworn, and in the actual enjoyment of the office. The question is, whether the Judge *collaterally* at the trial ought to have gone into the validity of these men's titles? Could the mayor have gone into it at the election? I am very clear he could not. There are modes sufficient, open to the partiality of

returning-

returning-officers, without adding more. Where the qualification is to be judged of by him, it cannot be avoided. In cafes of elections in the city of *London*, certain qualifications are required at the poll: therefore it muft be feen that in fome degree the candidates have that qualification. So where an election is to be tried which may involve many other rights. But where the right of election is in freemen in their corporate defcription; whether they were duly chofen or not, is not to be tried at the election of a third perfon; but they muft be properly *oufted*. What? after a poffeffion of twelve years, fhall their right be called in queftion and tried on an information againft other perfons who are propofed to be freemen? It is impoffible to be done. Suppofe the right depended upon their being fworn in before twelve burgeffes: is the right of thofe twelve to be tried in an information againft one? But the objection would go further; for there are corporations where there are thoufands of freemen. Upon the trial of a right of a freeman's election made by them, is the Court to go into the qualifications of all the thoufand to have been made freemen at the time they were elected? Certainly not. For this purpofe they are to be confidered as having a right. It is ftronger too in the prefent cafe, becaufe thefe were reftored upon a *mandamus*, though I do not go upon that. It is all one objection. It would be to lay down a rule, that a party upon every new election, fhall be at liberty to go into the corporate rights of all the members *de facto*; which is a propofition that was never before heard of. Therefore I think the Judge did right in refufing evidence to impeach their titles.

Suppose a corporate body consisting of twenty-four were to add ten to their number. That would be an absolute nullity; because they never were corporators *de facto*. But the present question is, whether in a *quo warranto* against particular members, you can go into the title of other corporators *de facto?* And I am clearly of opinion you cannot.

Aston, *Justice*.—Upon the second question I am very clearly of the same opinion. The *Carmarthen* case is in point.

The more material question is the first question, whether upon this record, there is sufficient to distinguish the case of *Grubb* and *Marshall* from the others? It does appear, that perhaps *Grubb* and *Marshall* may have been very well intitled under the statute 4 *Geo.* 1. to have demanded their freedom. But I cannot conceive a case, where a man has a right under a charter or statute by claiming it of the proper person, that, if refused upon that claim, and that claim only appearing on the record, it would be a good and complete right without a real admission. Upon the whole of the record, I think that *Grubb* and *Marshall* have put their defence upon their election, and stand on the same title as the rest. They have pleaded the usage of the borough in relation to the election. They then state the new rules of *Ireland* relating to this town of *Galway*; that nothing shall be done by the *tholsell* 'till it has passed the common-council. Then they state the oath to be administered; their residence; their being Protestants; their offer to take the oaths; and the demand of their freedom pursuant to the act. But saying so, does not make it in pursuance of the act.

Then

Then they ſtate that a *tholſell* was held, and that *Grubb* and *Marſhall* were propounded to be admitted; and were in due manner *elected* in conſequence. They plead therefore juſt as the reſt do. They join with the reſt at leaſt in ſaying they were *elected*, and that they took the *oaths* agreeable to *the charter*. Upon this plea therefore this was not a demand of their freedom in conſequence of the qualification under the act; but they have pleaded that they were elected as other perſons, without the act. The iſſue purſues the plea, that they were not elected; and I am clearly ſatisfied that this was a proper and not an immaterial iſſue.

WILLES, *Juſtice*.—I am clearly of the ſame opinion on the firſt point, but not on the ſecond: with reſpect to which the doubts I before entertained are not ſatisfied.—There is a confuſion upon the record whether freemen and freeburgeſſes are not the ſame. But certainly the common-council-man was a different perſon, and is not included in the act of parliament. The firſt right is by election, according to the cuſtom of the borough, and where a man is *elected*, he is in for life, unleſs he commits a forfeiture of his franchiſe. But the act of parliament declares the freedom ſhall continue only during reſidence. As it ſtands on the record, I cannot agree with my brother *Aſton* that the plea of all the defendants is alike. For *Grubb* and *Marſhall* have pleaded a title under the act of parliament. The others do not. The queſtion therefore is, whether there is enough ſtated in the plea to ſhew they are intitled under the act of parliament, and have done enough to acquire their freedom. If there is enough to ſhew that, and the iſſue is

joined on the election, it is an immaterial issue.

Now they first state the qualifications; next the act of parliament: what is the other requisite for them to do? they are to demand their freedom pursuant to the act. Does the plea go to it? The words are, "that they offered to take the oaths pursuant to the act of parliament." This was previous to any claim they had by election. But then they confound the two rights, by saying they *elected* and *admitted* them: as if the one term applied to one right, and the other to the other. They add that they have taken the oaths before the *mayor* and *two* of the *burgesses*; but joining the *burgesses* was not a necessary circumstance upon taking the oaths on admission: if they took them before the mayor, they had a right under the act of parliament. I do not therefore think the judgment of *ouster* should pass against them.—There is a strong case in *Strange*, 625. *Rex* versus *Hearle*, which makes me also in doubt, whether the judgment of *ouster* on this record will not bar the defendants title under the act, even if they should apply in a proper way; unless they can shew a new *subsequent* acquired right.

Ashhurst, *Justice*.—I had a doubt about a repleader upon the first title: but the joining issue upon the election makes the title under the act of parliament unnecessary. For if they had meant to have relied on that, they would have demurred to the replication.

Further, upon these pleadings, the title they have set forth in the plea under the act of parliament, is not complete; because the qualification

cation of being a Proteſtant, &c. is not a complete, but an inchoate title; which they had a right to have rendered complete, by taking the proper ſteps before the mayor. Have they taken thoſe ſteps? If they meant to be admitted under the act, they ſhould have given notice of ſuch their intention. But it does not appear that they applied to the mayor to be admitted under the act. The contrary rather appears: for the admiſſion ſet out is, an admiſſion by the *mayor* and *common-council*; which was an admiſſion *under the charter*; and not under the act of parliament. Therefore, if there is not a complete title under the act of parliament, judgment of *ouſter* muſt go againſt them.

Beſides, the court will not grant a repleader, but where complete juſtice may be anſwered. If a repleader were to be granted, the parties muſt begin from the point of pleading where the immateriality begins: the defendants ſay, it is in the replication. I think the iſſue taken on the replication is not an immaterial iſſue. What would be the conſequence of granting a repleader? The relator might reply *de novo*. He might in that caſe demur; it would be doing nothing more therefore than putting him to demur for the duplicity of the plea, and the ends of juſtice would not be anſwered. If judgment of *ouſter* is given on this right, it will not make the other title of the defendants bad. Therefore I think the judgment ought to be againſt them.

On the ſecond point I concur, that the diſqualification of voters for non-reſidence ought not to have been gone into at the time of election. If upon ſuch a general iſſue as *non fuit*

electus,

electus, it could be done, it would be the cauſe of endleſs prolixity.

Judgment affirmed.

As the doctrine of repleader is not generally known, the following abſtract of caſes (collected together in *Com. Dig.* V. 5 & 6.) may prove uſeful, as containing a great deal of matter, thrown into a narrow compaſs.

Yel. 210. Da.l Ab. 720. In an action againſt huſband and wife, both ought to join in plea, and therefore if the wife alone comes and pleads, there ſhall be a repleader.

2 Cro. 28 So, if the entry be that the huſband and wife come and defend the force and injury, and the aforeſaid *wife* ſaith that ſhe is not guilty.

5 Com. Dig. 168 Though the *firſt* be ſuppoſed by the wife only: as, in battery againſt huſband and wife, for a battery by the wife.

R. 2 Cro. 288. Yel. 210. So, in *aſſumpſit* againſt huſband and wife, upon a promiſe of the wife *dum ſola*.

R. Yel. 210. So, in an action for words ſpoken by the wife only.

R. 1 Brownl. 197. So, in battery againſt huſband and wife and others, if the wife and others plead *not guilty*, and the huſband *ſon aſſault*, it will be bad.

R. 2 Cro. 239. So, in battery againſt huſband and wife, if the huſband juſtifies in aid of his wife, and the wife only pleads *ſon aſſault*, it is bad.

Semb. Cro. Car. 594. So, they ought to join in the averment, *and this they are ready to verify*.

R. Cro El. 883. R. Hob. 126. R. 2 Cro. 5. But, where the *tort* is ſuppoſed by the wife alone, though both join in pleading, yet the iſſue ought to be, that the wife is not guilty; and therefore in *trover* upon a converſion by the wife, if the huſband and wife plead that *they are* not guilty, it is bad, and a repleader

6 ſhall

ſhall be awarded, for it ought to be, that *ſhe* is not guilty.

R. Cont' in an action for words by the wife, for both are chargeable with a wrong done by the wife. Cro. Car. 417.

R. Acc. in action for words by the wife. 1 Browul. 6. Pal. 68. and Q. if this is not law?

Yet in debt againſt them, they may plead, that *they* do not owe. Noy, 41.

The iſſue that *they* are not guilty cannot be amended. This after verdict. 2 Cro. 530. R. Cont. 1. Browul. 7.

But, if the dogget be that the huſband and wife *plead* not guilty, and the roll be that the wife *ſaith*, omitting the huſband, it ſhall be amended; for it is only the miſpriſion of the clerk, for the dogget was a warrant to him to enter on the roll a plea for both. R. 2 Cro. 530.

If the verdict finds that the wife alone is guilty, it aids the plea. R. Pal. 68.

If an iſſue is miſjoined, or joined on an immaterial point, &c. when it is not aided by the *ſtat.* 32 *H.* 8. a repleader ſhall be awarded. Cro. El. 883. R. 1 Lev. 32. (Vide ante.) 2 Mod. 137. 44.

So, if the iſſue joined is nugatory and void, whereon the court cannot give judgment. R. Mod. Ca. 2. Hard. 331.

So, if the iſſue is concluded to the country, where it ſhould be to the record, &c. or *è contra*. R. 1 Leo. 90.

There ſhall be a repleader of a bar, replication, or rejoinder, which is bad; for at the firſt defect the repleader begins. Ray. 458.

By the common law, if an immaterial iſſue was joined, the court might award a repleader before trial. 2 Salk. 579.

But will not now, where the iſſue joined will be aided by the ſtatutes of *jeofaile*. R. Mod. Ca. 3. Salk. 579.

So there ſhall not be a repleader where the treſpaſs is confeſſed, though the iſſue was immaterial. 1 Salk. 173.

And

. El. 883. 331. Leo. 79. There may be a repleader after a verdict.

But generally there shall be no repleader upon a demurrer, without the consent of the parties. *Per* 2 *J. Rol.* 271. *Mo.* 461. *Agr. Mo.* 867. *Lat.* 147. *Adm.* 2 *Lev.* 142. *Cont. allowed* 3 *Lev.* 440. *per Powell Mod. Ca.* 102. *R. Sav.* 89. 2 *Bul.* 37.

Yet, if there be a bad bar, and a bad replication, a repleader may be awarded upon a demurrer. Bro. Beplead. 39. *But Periam said, the roll of that case could not be found. R. Pl. Com.* 138. *a. But Periam said, that there it was by consent.* 1 *Leo.* 79. *Acc. per* 3. *J. Periam Cont.* 1 *Leo.* 79. *But in the same case it is doubted. Sav.* 89. *Semb. Cro. El.* 318. 1 *And.* 167.

R. Mod. C. 5. So there shall be no repleader, where by the defect in joining issue, there is a discontinuance.

R. 1 Salk. 216. 2 Salk. 579. Or the defendant make default at the trial, whereby he is out of court.

R. 1. Rol. 287. If issue be joined in Chancery, and the record sent into *B. R.* to be tried, for a defect in the *venire facias* a repleader shall be awarded in *B. R.* and not in Chancery; for the record being in *B. R.* can never be remanded.

Per Hale, 2 Saund. 319. 2 Lev. 12. V. ante. So anciently a repleader was awarded upon a writ of error, but this is now obsolete. *Cont.* in *Tindal* and *Brown*, *b.* 152.

R. Mod. Ca. 2 Salk. 579. If a repleader be awarded or denied, when it should not be, it will be error.

Ibid. If a repleader be awarded, the judgment is *quod replacitent*, and the fresh pleading begins where the first defect was.

Ibid. There shall be no costs on a repleader. *Sed vide ante* 441, *&c.*

Hackshaw v. Rawlings, H. 3 G. Stra. 23. There shall be no repleader where defendant pleads payment, and acceptance in satisfaction

of

of debt on bond, and plaintiff takes issue on the acceptance.

After inquest is taken by default, defendant cannot be received to make suggestion on the roll, for after default there can be no repleader. Brampton v. Crabb, H. 3 G. Stra. 46.

Although an issue is immaterial, yet a repleader shall not be granted, if the cause can be ended more expeditiously; as if the plea be ill, or good in form, though not in fact, and amounts to confession. Rex v. Philips, M. 7 G. Stra. 394.

If plaintiff declares on a lease to *A.* which he lays is come by assignment to defendant, and he pleads that *A.* did not assign to him, and issue is joined, there shall be a repleader, for it is an immaterial issue. Enys v. Mohun, M. 3. G. 2 Stra. 847.

In debt on bond, if defendant pleads payment before the day under a *scilicet*, there shall not be a repleader. Cowne v. Barry, M. 7 G. 2. Stra. 954.

If a bond is conditioned for payment of money, *on or before* 5th of *December*, and defendant pleads payment on 5th of *December*, and plaintiff replies, and verdict for plaintiff, there shall be a repleader, for it is an immaterial ssue. Tryon v. Carter, M. 8 G. 2. Stra. 994.

Qu. de hoc? Suppose evidence of payment before the day, is not that payment on the day?

When the finding on an issue does not determine the right, the court ought to award a repleader, unless it appears from the record, that no manner of pleading the matter could avail. Rex v. Philips, p. 30 G. 2. 1 Burr. 292. which vide ante.

FINIS.